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Modern American Law

A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law

PREPARED BY

JUDGES, MEMBERS OF THE BAR, TEACHERS IN LAW SCHOOLS, AND WRITERS ON LEGAL SUBJECTS

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BLACKSTONE INSTITUTE
CHICAGO

Modern American Law

GENERAL INTRODUCTION

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THE CITIZEN AND THE LAW

BY

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LAW—ITS ORIGIN, NATURE AND DEVELOPMENT

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CONTRACTS

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VOLUME 1

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GENERAL INTRODUCTION

A strong man and a strong nation result from an intimate knowledge of and a strict insistence upon legal rights. To know and assert one's legal rights is a duty of moral self-preservation—ignorance and neglect of those rights is moral suicide. The security of the individual as well as of society lies in a wise and equitable system of law, thoroughly understood by every one and impartially administered by courts of unimpeachable integrity. To know the system of law under which we live is every citizen's paramount interest and duty, not merely that he may thereby protect his own private interests, but also that he may be able efficiently to preserve his government and take an intelligent part in its administration and improvement.

To facilitate the acquisition by every citizen of an adequate knowledge of his legal rights and duties, and to give him a thorough understanding of the system of law and government under which he lives, MODERN AMERICAN LAW was prepared. It is a general, systematic, and comprehensive commentary on those fundamental principles of American Law and Practice which concern all persons in the ordinary affairs of life.

The commentaries of Sir William Blackstone on the laws of England, and of Chancellor James Kent

on American law, demonstrate the feasibility and value of presenting, within comparatively narrow limits, the principles of the law. The works of legal writers of a previous century, however, do not adequately expound the law of the present day. The rapid increase of legislation, the enactment of constitutional amendments, and the necessity of applying the principles of law to new problems clearly indicate the need of a modern commentary. MODERN AMERICAN LAW is the work of judges, teachers in law schools, and writers on legal subjects. The authors present not only the modern rules of law, but, as well, the origin, nature, and growth of the law.

The work is offered in the confident hope that it will take its place as a luminous and complete commentary upon the existing system of law. It is also hoped that it will assist in solving the great problems of government by materially hastening the day when the layman as well as the lawyer will not only have a knowledge of the general principles of law, but will understand the reasons behind the principles, as well. Such a knowledge and understanding will do much in fitting all citizens to discharge intelligently their civic duties. It will also engender a wholesome respect for law and order and an appreciation of the blessings of the free institutions under which we live.

EUGENE A. GILMORE,
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PREFACE

An intelligent citizenship is the bulwark of a successful and permanent government. Most of the difficulties which individuals have with each other arise from misunderstanding and ignorance. Likewise, much of the criticism and lack of appreciation of our government and law arises from misunderstanding and ignorance with respect to the origin, nature and spirit of our institutions. Discontent, demagogy, anarchy, and revolution thrive on ignorance. The fantastic and impracticable schemes of bolshevism and the much-heralded panaceas for the ills of the body politic make little headway where the citizens are intelligent and well-informed.

In order to afford an opportunity for a proper understanding and appreciation of our present system of government, the first subject discussed is "The Citizen and the Law," by John B. Winslow, late Chief Justice of the Supreme Court of Wisconsin. This is a brief but comprehensive treatise on the duties of the citizen with respect to his government.

Following this treatise comes "Law—Its Origin, Nature and Development," by Professor Charles A. Huston, Dean of the Law Faculty of Leland Stanford Junior University. It is essential to the proper

understanding of our legal system that before beginning a detailed study of particular subjects, the reader should take a general survey of the whole field of the law.

After these general introductory treatises comes one of the basic subjects of the law—"Contracts," by Mr. William Charles Wermuth, former lecturer at Northwestern University Law School. Underlying most all other parts of the law are the fundamental principles of Contracts—the body and blood of trade and commerce.

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PART I

THE CITIZEN AND THE LAW

BY

JOHN B. WINSLOW, LL.D.*

If we judge the flight of time by centuries rather than by individual years, and measure progress by great world movements, rather than by the petty events of this or that community, we shall find that it is no very long time since the law was generally regarded as a mysterious, if not an occult, science, entirely beyond the grasp of the ordinary citizen.

Its decrees were accepted and obeyed not because they were based upon reason, but because they emanated from a power capable of enforcing them.

When told that some grievous and palpably unjust result must be endured because the law said so, the citizen was, perforce, content, or at least resigned to his fate, wondering, perhaps, why it must be so —but hardly venturing to think that law could ever be made logical and just, as well as inexorable.

In the days of the rule of kings absolute, this attitude of the citizen towards the law was natural and almost inevitable.

* Late Chief Justice of the Supreme Court of Wisconsin; Ex-President, American Institute of Criminal Law and Criminology. Author: "History of Supreme Court of Wisconsin"; "Legal Forms."

The subjects of a feudal sovereign had a valid excuse for not familiarizing themselves with the fundamental law of the state. They did not make the law and could not change it, however wrong it might be.

The citizens of our country, however, have no such excuse; they are, directly or indirectly, the lawmakers, and it is their duty no less than their privilege to know the law and to change it if it be wrong.

The future historian will find many things of surpassing interest when he comes to review the opening decades of the twentieth century, but he will find nothing more interesting or significant than the tendencies toward an extreme democracy.

If the people are to rule in person and not by representatives,—a proposition which, as applied to a great and populous state, is impossible,—the people must be fit to rule. To be fit to rule they must not only be educated, but the great mass of them must be of good moral character. If the fountain head be poisoned, the waters of the stream cannot be sweet.

The question of whether the American electorate, in small communities where a democracy may be possible, is in all respects fit to assume the duties and responsibilities of a democracy is by no means free from doubt. We are much accustomed to boast of the intelligence and good morals of our people, but "boasting proves nothing."

Taking up the question of whether the moral tone of the people is improving as the need for higher ideals increases, we shall find conditions not altogether reassuring. In the first place, we find that the industrial revolution has brought us not only the

vast factory, and largely supplanted human labor with machine labor, but has added very serious difficulties to the problem of maintaining, not to say elevating, the moral standards of the people.

The great city has come, and come to stay, and it has brought its great problems with it—problems which will call loudly and more loudly for solution as the years go by.

They are the problems of the slum, the tenement house, the social evil, of child labor, of congested population and insanitary living, of alluring vice in all its phases; and many others, all of which have greater or less bearing upon the physical and moral manhood and womanhood of the race.

The sturdy farmer, who is daily breathing in health and strength under the open sky, surrounded by the inspiration of Nature's wonders, is giving way to the city dweller, the operative in the great shop, and the thousand and one stunted and narrow-chested workers in the city streets, who just manage to keep body and soul together, and who go to bed at night hopeless and wearied, or try to drive away all thought of the morrow by forced and shameful merriment. The picture is not overdrawn, and it is not encouraging to one who is looking for improvement in the moral tone of the people at large.

This is not to say that the moral fibre of the nation is weakening. Churches, schools and philanthropic societies of various kinds are working as never before, but there is need of such work as never before.

The political condition of most, if not all, of our great cities is distressing already, under a represen-

tative democracy; what will it be if we are to have direct democracies?

What will it be when the cleavage between great wealth and abject poverty becomes more pronounced?

What will it be if class hatred grows more acute? What will it be if the urban nurseries of crime go unchecked and the professed criminal classes increase in the future as they have in the past?

Who can answer? It is not pleasant to speak of these things,—indeed they are not much spoken of in our best society. People go to their receptions, their teas and their banquets, and talk of the weather, of the last opera, or the latest book. It is far more comfortable to ignore such disagreeable questions as those suggested. Yet the time has certainly come when they must be considered, and the wonder is that anyone could think of ignoring them.

So far only the problems which are peculiar to the great city have been spoken of, but there are others which are present not only in the city but in the village and in the country as well, and they also threaten to affect the moral tone of our citizenship.

The great increase of wealth and luxury which has come from the development of our wonderful natural resources has resulted in a perceptible lowering of ideals.

Our forefathers struggled for their very existence in the face of tremendous difficulties; they subdued forests, endured the privations of the frontiers, and in the midst of toil and privation laid the foundations of the state that was to be. Amid such labors and pri-

vations it was natural that they should develop the sterner elements of character, the elements of fortitude, both physical and mental, of self-control, steadfastness and probity of purpose.

We who have entered into their labors and are reaping the results of their self-denial, either by way of making gain from vast business enterprises or dwelling in an atmosphere of ease or luxury, which they made possible, are quite apt to have our thoughts directed to the material things—the things which make life pleasant and enjoyable, to the neglect of the sterner virtues.

It is not possible for one citizen, or for any group of citizens, to make any appreciable change in the material conditions of the age in which we live. We cannot go back to the days of our fathers if we would. "The moving finger writes, and having writ, moves on,"—not backward.

The great city will become greater, the opportunities for the acquisition of wealth will not decrease but rather increase, the use of the conveniences and luxuries which modern life places within our reach will not cease, the temptation to live a life of ease and pleasure, regardless of the cry of the unfortunate and afflicted, will be just as strong.

How are all these weakening tendencies to be met and overcome?

How are we to make sure of that high grade of morality in our citizenship which will be necessary in such democracies as we may have?

This question is probably not capable of an authoritative answer in a single word, nor will the attempt

be made to give it one, but the word which comes nearest to it is the word "Service."

For centuries individualism has been the keynote of civilization, especially in this land which has boasted so loudly of its freedom and equality. We have gloried in the idea that every man was the master of his own destiny and must fight his battle alone; we have seen the struggle for wealth and social distinction—nay, even for the necessities of life, become fiercer and fiercer, and we have condoned the ruthless cruelty and selfishness of it all on the ground that all citizens have equal opportunities and that the triumph of the strong and the trampling down of the weak is but the working of Nature's immutable and righteous law.

But the consciousness that man cannot live for himself alone has come at last; the public conscience is awake; we now, for the first time, realize faintly and imperfectly the marvelous significance of the parable of the good Samaritan. We are learning who are our neighbors and we are realizing that an injury to "one of the least of these" is an injury to society as a whole.

Thousands of men and women with the spirit of the good Samaritan in their hearts are hearing the call—men and women who could, if they chose, be clothed in purple and fine linen, and fare sumptuously every day. But they have chosen the better part. Comparatively speaking, their work has but just begun, and yet there are results to show. The slum is yielding to the settlement. The haunts of vice in the great cities are still practically untouched,

but there is handwriting on the wall, and the waves of an awakened public sentiment are rising with ominous strength.

Everywhere earnest men and women are banding together and devising ways and means, by which moral standards shall be raised, the frightful injustice of modern life in the great cities shall be corrected, disease vanquished, vice made hateful and life made to hold forth its promise of hope and joy to the most unfortunate.

The layman is springing to the aid of the priest and the preacher, not always using methods which the priest and the preacher approve, and not always relying on orthodox theology, but still rendering great and undoubted service to the cause of good morals and good citizenship. He will not supplant the church, but he will be its efficient aid.

He will not use so much the methods of prayer and praise; these he will leave largely to the church, but he will use intelligence and legislation; he will build, if it be possible to build, a system of law which shall assure justice to all, which shall, as far as may be, equalize opportunity, rid the city of the slum, protect childhood, stop the propagation of defectives and criminals, and gradually eliminate poverty, disease and crime.

The vastness of this programme is only exceeded by the desirability of its realization. It has been said that these American commonwealths are too much given to legislation already, and the countless volumes of useless statutes now burdening the shelves

of our law libraries are pointed to with derision as proof of the fact.

There is too much truth in the gibe to allow its being turned aside without notice. We have had and are still having too much hasty and ill-digested legislation. It is natural that it should be so. New states, filled with young and enterprising people, facing new questions and charged with the duty of developing untold natural resources, will necessarily adopt new and untried means of meeting difficulties. There are few conservatives in such communities; youth and inexperience know not fear and dread not novelty. Every man in a new community is apt to deem himself a fully equipped legislator, ready and able to take up the greatest questions of statecraft, and settle them satisfactorily in a three months' legislative session.

In view of all the circumstances, the wonder is not that there has been so much useless legislation, but that there has been so little. The results prove not by any means that legislation is futile, but rather that it must be more scientific if the best results are to be reached.

We are willing to admit that we ought to have experts for other governmental functions which require special qualifications, but we seem very slow to learn that law-making is the most difficult science of all, because it requires not only the wisdom of the philosopher and student of history, but the foreknowledge of the seer.

He who would make a new law in a yet untrodden

field of legislation must have the ability to read the future as well as the past; he must have prescience as well as experience.

But we ought to be fair to the legislatures of the past, even though we feel obliged to be critical. Notwithstanding their blunders and the mass of hasty, crude, and ofttimes absurd legislation which they have piled upon our shelves, it would be untrue to say that they have accomplished no valuable results.

Decry their ill-considered efforts as we may, we must admit that there are two sides to the picture, after all. They have not been experts, but they have done valuable work, notwithstanding their inexpertness.

Consider for a moment the matter of compensation for injuries received by workingmen in the course of their employment, and the compensation of their families in case of death resulting from such injuries.

Prior to the development of the railroad, the mammoth shop, and the infinite mechanical dangers to which the modern workman is momentarily subject, the common law had laid down a few simple principles regulating the liability of the master in case of his negligent default resulting in injury to the servant, and denying any liability in case the injury was caused by the negligence of a fellow servant, or in case contributory negligence or assumption of risk existed on the part of the employee.

These principles were not seriously faulty, perhaps, when applied to the conditions of the time. Those were days when the workman knew his fellow

servant, worked with hand tools or simple machinery, and ran comparatively small risk of injury. The personal injury action was one of the rarest actions upon the calendars of the courts.

Gradually, very gradually, the great industrial revolution came upon us. The little body of workmen, all knowing each other and working within sight of each other with simple tools, by slow and almost imperceptible degrees became the army of employees working, perhaps, at great distances from each other, and known by number rather than by name; the small shop grew to the enormous plant, covering acres; the simple machinery, under easy control, became a mighty and complicated system of vast machines, driven by a power rivaling that of the thunderbolt itself; and the lumbering stage coach gave way to the palatial railway train.

During the same time, and by equally slow and imperceptible degrees, the occasional simple accident was replaced by daily and almost hourly accidents, amounting frequently to tragedies; and the victims of industrial accidents became a veritable army, marching with halting steps and dimming eyes to the great hereafter.

Slowly and imperceptibly, also, personal injury actions increased in number until they began to clog the calendars of the trial courts. It was not the proper function of the courts to change well established principles of law, and so the doctrines of fellow-servant, contributory negligence, assumption of risk, and ordinary care continued to be applied as they were applied in the earlier and simpler days.

The result was a really deplorable condition of things. The injured man or bereaved widow was generally poor and unable to employ an attorney in the ordinary way, and hence was generally obliged to pay the attorney by giving him a share (and sometimes a very large share) of the recovery, if a recovery was had.

This system wrought harm in more ways than one: It distinctly lowered the tone of the bar by creating a class of attorneys who sought such business and became really fomenters of such litigation; the lawyer became a joint adventurer with the client, and his keen interest in the result dulled his conscience and tempted him to overlook perjury, if not actively to encourage it.

On the other hand, juries well knew that the recovery would have to be divided with the lawyer, and thus often rendered excessive verdicts in order that the injured party might have adequate compensation after the lawyer's share had been taken.

Thus the economic waste became enormous. The employer, after contesting the case through all the courts, not only paid an exorbitant sum if defeated, of which the injured person received only a fraction, but he also paid a considerable sum to his own lawyer, even if successful, of which, of course, the injured person received nothing.

One could hardly imagine a greater economic waste than this. A system which spends many dollars in the effort to ascertain whether one dollar should be paid by one citizen to another can scarcely be considered a desirable system.

But a still more unfortunate result of the situation was the bad feeling which it encouraged between employee and employer, and the distrust with which the employee, defeated perhaps by one of the common-law defenses before mentioned, began to regard the courts. The employer was charged with heartlessness and greed, the courts with dishonesty and corruption, and the litigant frequently met the supposed combination between capital, on the one hand, and courts which rigidly enforced the technical rules of archaic law, on the other, with flat perjury.

Class hatred, distrust of the courts and the law, wholesale perjury, and enormous economic waste—these were the inevitable and lamentable results of the legal proceeding known as the personal injury action. Here the common law was surely breaking down.

Nothing short of legislation novel in its character could meet these grave questions, and that legislation has finally come in many of our states, and will unquestionably follow in all.

In most of the states where this legislation has been attempted, two definite results have been aimed at:

First, to reduce to the minimum the number of injuries, by rigid inspection of all manufacturing establishments, and by the enforced introduction of every practicable safeguard against accident or disease.

And, second, to provide in some form, on a fair and equitable basis, for the automatic adjustment of

claims for all industrial accidents so that every injured employee (not wilfully negligent) should be assured of a reasonable indemnity, without delay and without expense, the method of payment being so arranged that the consuming public should ultimately bear the burden.

The first of these aims was relatively easy of accomplishment, but the second has been fraught with much difficulty by reason of the restraints imposed upon legislation by the terms of our written constitutions. While it would not be accurate to say that the problems have been fully solved, it may be said with confidence that the legislation already secured has been substantially successful and that the results make certain ultimate extinction of the personal injury action between employer and employee, and great reduction in the number of industrial accidents.

These things have been accomplished by legislators who are not experts; who have been forced to act with little help from scientific investigation or research, and who have left their regular occupations for a few weeks of struggle with and attempt to satisfactorily solve some of the gravest questions which have ever confronted the human family.

In other fields, where modern civilization has produced evil conditions with which the common law has been unable to cope successfully, legislation has made fairly satisfactory efforts to meet the new problems. Witness the sanitary inspection laws, the tenement house laws, the laws preventing the employment of children in life-destroying occupations, the laws regulating the service given to the public by

public utility corporations, and many other laws which can not here be mentioned.

Who shall say, in the face of these achievements, imperfect though they may be, that legislation is futile, or that the legislators of the past have done little but cumber the statute books with useless laws?

Rather we should say that in scientific and well considered legislation lies the great hope of the future. The ever-increasing problems arising from our complex community life will have to be met unless we are ready to admit our incapacity and are content to follow the civilizations of the past into well merited decadence and oblivion.

And so it seems as certain as any future event can be that we are entering on a period of great legislative activity, when remedies will be proposed for all our ills, both real and fancied. It may be at once admitted that legislation can not remedy every wrong, nor make the nation virtuous and moral; but still it is undoubtedly true that legislation can exert a profound influence on the morals of a people by eliminating as far as possible the material conditions which make for misery and crime, by creating and fostering those conditions which make for happiness and right living.

Vice will find little room for growth in a community where prevail living wages, healthful homes, equal opportunities, innocent amusements for young and old, and social justice; where the slum, the bawdy house, and the indecent shows do not exist.

Now, if these conditions are to be brought about or hastened by legislation, and if the people them-

selves by means of the initiative and referendum are to take a controlling or even an important part in such legislation, the necessity of a highly intelligent as well as a moral electorate is very evident.

Not only shall we require the services of the skilled investigator and philosopher in the preparation of the new laws; not only shall we require the legislative expert in our national and state legislatures; but, above all, we shall require an educated electorate —an electorate capable of appreciating the nature of the problems presented, and sufficiently acquainted with present conditions, both material and legal, to be able to judge of the wisdom of the proposed legislation, and to vote intelligently thereon.

This does not mean that all citizens must become lawyers, but it does mean that *the study of the law should no longer be left to the lawyers alone;* it does mean that the law should cease to be regarded as a sort of black art, whose unaccountable results only the initiated can understand, *but as a true science of which every citizen should have at least a general knowledge.*

Up to the present generation it was not considered essential that people in general should know anything of physiology and hygiene, of sanitation and dietetics. It was considered sufficient for the good of the human race if the physician knew.

But this knowledge formerly held by the physician alone is now considered an essential part of the education of every individual. The protection of his health and the promotion of his daily efficiency have rendered the knowledge of physical exercise, sanita-

tion, hygiene, and dietetics necessary to every human being.

The law is the fundamental science which has more to do with our life, liberty, and happiness than any other influence.

It has heretofore been considered sufficient that lawyers knew this science. But, in the rapid changes of the world, with the greatly augmented responsibilities of every individual, we have come to know that *everyone* should have a knowledge of the law which has upon his life, his liberty, and his pursuit of happiness, an influence beyond our power to estimate.

PART II

LAW—
ITS ORIGIN, NATURE AND DEVELOPMENT

BY
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ELEMENTS OF LEGAL THEORY

CHAPTER I.

THE NATURE OF LAW.

1. **Ways of beginning the study of law.**—There are two very distinct ways of beginning the study of law, ways which may roughly be distinguished as the practical and the logical. On the one hand, a start may be made with the separate rules of law which constitute a chief content of a legal system. Or on the other, one may begin with some consideration of the first principles which underlie the great mass of separate rules and make possible its organization into a system. This latter method has obvious logical advantages, but its practical disadvantages are equally obvious. First principles, to

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be fully comprehended and appreciated by the student, must be arrived at by a process of induction from concrete applications of them, applications which in our law are found largely in the form of decided cases. On the other hand, the concrete details of the law are more fully understood, and their content better remembered, if they are seen and recognized as interrelated parts of a general system, a system based on certain fundamental principles. Some background of legal theory and legal history, slightly sketched at first but gradually growing in elaborateness, is at least highly desirable as a preparation for any really scientific study of law; and it is even more important that the student should seek from the first to cultivate as a habit of mind the consideration of the social origin and purpose of the rules and principles of law which he learns, and their relation with each other as parts of the legal system.

2. **The meaning of law.**—The law with which lawyers deal is concerned with the control of men's conduct. Law in this sense is thus readily distinguishable from the figurative use of the word "law," common in the natural sciences, for instance, in the phrase "the law of gravitation." But it is harder to distinguish the law, as lawyers use the word, from the laws of etiquette, morals, and religion, all of which alike provide standards to which men's actions are conformed. In primitive societies, indeed, these various influences moulding men's conduct are not at all distinguishable. The fear of social disapproval, of the armed vengeance of the

tribe, or of the individual or group their acts may injure, and the dread of the wrath of offended gods,—all combine to keep men in the path which custom has marked out as safe. Gradually, however, the means by which conformity to these different standards is secured are differentiated. The pressure of social opinion, the dictates of a man's own conscience, or the teaching and influence of religious authority, are relied on to secure conformity to those rules of social conduct which are not regarded as law in the stricter sense of the word; while those which are so regarded find recognition and, in the course of time, enforcement, in definitely organized public tribunals, the courts of the state. Laws, then, are the rules of conduct which are recognized and enforced in courts of law.[1]

An important distinction is, however, to be taken between "a law" and "the law." A law is a rule which forms a part of the law; but the law is not merely the sum of these rules. It is rather a system composed not solely of rules, but also of general principles derived from judicial experience and reflection, and bringing the mass of separate rules into a unified whole—a system for the guidance and ordering of men's conduct in their relations with each

[1] "A law, in the proper sense of the term, is therefore a general rule of human action, taking cognisance only of external acts, enforced by a determinate authority, which authority is human, and, among human authorities, is that which is paramount in a political society. More briefly, a general rule of external human action enforced by a sovereign political authority.

"All other rules for the guidance of human action are called laws merely by analogy; and any propositions which are not rules for human action are called laws by metaphor only." Holland, Elements of Jurisprudence, chap. 3.

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3. **The administration of justice.**—Law, then, is a system of rules and principles used by the courts in the administering of justice. The achieving of justice is its purpose and end—the establishment and maintenance, that is, of such relations between man and man, and between man and the community and the state of which he is a member, as in the opinion of the community will further social progress. This administration of justice by some recognized authority is a necessary step in the evolution of society. Social experience has demonstrated that man's natural sense of justice is inadequate permanently to secure such action on the part of all the members of a society as will assure the conditions of social progress. Some external authority must be provided, some means of social control over individuals, to adjust their conflicting interests. The arbiter may be priest or ruler, popular assembly or gild meeting; but some tribunal for the administering of justice is required, not only for the advancement of society but for its very existence. Private vengeance for wrong, private self-help in assertion of a claim of right, if left free to run their course, would disrupt and eventually disintegrate society. The substitution of civil justice for self-help and of criminal justice for private vengeance is an epochal event in the history of civilization.

4. **The evolution of law.**—The judge precedes the law. A court may be a court of justice without being a court of law. The judgments of Solomon as recorded in the Old Testament settled disputes between litigants by means of the shrewdness and nat-

ural sense of justice of the judge, unguided and also unhampered by any system of predetermined principles. So, too, the tribunals of our own Far West on the ranges and in the mining camps of half a century ago administered a justice which owed little if anything to Blackstone, or even to remembered rules of the common law, but much to the judge's sense of fairness and his knowledge of the equities of the particular case before him. It is, however, only in the simplest and most primitive social groups that the administration of justice can be permanently based on the wisdom and fairness of an individual judge. Such a plan, however effective it may be in adjusting disputes which have arisen, is ineffective in enabling men to avoid new ones. Men, especially when their judgment is warped by self-interest, are incapable of deciding for themselves whether or not a contemplated course of conduct will seem just to the court that may be called upon to pass upon it. The need of a formulated rule by which men can guide their future conduct is one of the basal causes for the administration of justice by law. Moreover, as the community grows in size and the activities of its members become more complex, more calls for adjudication will arise than can possibly be met by a single tribunal. But similar cases should obviously be similarly decided by different judges; and, practically, a uniform course of decisions is possible only when the decisions follow some formulated principle or rule. Thus both the community and the tribunal inevitably come to recognize the need of settled principles and rules by which the admin-

istration of justice will be made predictable and uniform.

Again, the natural tendency of the court itself is to follow, where the cases are substantially similar, the lines it has laid down in earlier decisions, and thus to impart uniformity to its practice. The reasons which prevailed with it in the former case are likely to be cogent still; and moreover, to adopt the decision as a rule in the subsequent case saves the time and mental effort involved in retracing the process by which the former was arrived at.

In response to these contributing causes—the tendency to repetition by the courts, the demand for uniformity and certainty by the community—the course of justice becomes in the main and characteristically justice according to law, that is, according to predetermined and definitely formulated rules and principles which more and more restrain and bind the once unfettered discretion of the judges. The administration of justice becomes administration according to law when judicial action becomes uniform because governed by general and formulated rules and principles.

No system of administering justice can be entirely reduced to rule. The variety of possible cases calling for adjudication is practically limitless, and all attempts to provide for a complete covering of the field of human action by predetermined detailed rules have proved, and must prove, futile. Nor would a complete reduction of the administration of justice to procedure under definite rules be desirable even if possible. Some questions can far better be

settled by allowing a trained judge to exercise his discretion freely upon the facts of the particular case. But in these cases such uniformity of decision as is desirable may be expected to result from the training of the judiciary in legal reasoning and the application of legal rules, and from the influence of the criticism of the legal profession upon the course of their decisions. Both bench and bar are by education and habit inclined to refer action to definite principles and to seek to base their decision on reason.

5. **The sanction of law.**—Historical investigation seems to establish that obedience to the decrees of the tribunals which administered justice in primitive societies was secured by the forces of public opinion and religion prior to its systematic enforcement by the state. Today, however, a characteristic mark of the law is that its sanction, the coercive force which lies back of it to compel obedience from a recalcitrant, is the physical power of the state. By this physical character of its sanction the law is distinguishable from other instruments of social control. Conformity to social ends is secured now, as it always has been, not only by law but by the forces of religion, morality, and public opinion. Most men are good citizens not because of the coercive force lying back of law, but because of the persuasions of their own conscience, their unwillingness to incur the divine displeasure, or their reluctance to defy the force of public opinion. But powerful as are the sanctions of these forces, they are essentially psychical. They react primarily on the mind of the per-

son influenced by them. Defiance of them does not directly affect a man's physical person or property. Moreover, in case of conduct inconsistent with their precepts no definite human authority can be appealed to. The sanction of law, on the other hand, is primarily physical. Disobedience to the rules laid down by its tribunals is today the ground for the official intervention of the state to enforce these rules by seizure of the disobedient party's property or imprisonment of his person, or in extreme cases by the infliction of death itself as a penalty for violation of the rule of law.

And yet, while law is thus directly dependent for enforcement against the disobedient upon the physical force of the state, in the long run its effective sanction is still the moral sentiment of the community. A law, however established, to which the community is hostile or even indifferent soon becomes a law in name only. In the Anglo-American legal system this is particularly true, because of the large element of popular participation in its enforcement as well as in its creation. The jury of the vicinage and the elected executive officers of the law often nullify both the legislatively expressed will of the state and the judicially formulated rules which are the product of legal reasoning and experience.

CHAPTER II.

THE SOURCES OF LAW.

6. **The sources of law—In general.**—If law is the system of rules and principles used by the courts in administering justice, the inquiry is natural: Whence do the judges obtain these rules by which their discretion is controlled? The law derives its sanction and authority from the state, but not necessarily nor wholly its content. The state enforces laws which it did not itself make. The sources from which the rules of law are ultimately derived are incapable of exhaustive enumeration, but those of the greatest importance and influence are custom, judicial precedent, legislation, judicial reasoning, professional opinion, and juristic writings; and the current political, economic, and ethical ideas which are loosely grouped in legal phraseology now as public policy, and again, when the ethical element is predominant, as natural law. It is, however, important to note that all legal systems recognize a certain order of precedence among these sources. The direct formulation of the will of the state in legislation is everywhere given primacy. If the state has laid down a rule covering the case at bar, the court has no discretion but to apply the legislatively provided rule. To legislation as a source having this imperative character, Anglo-American law adds two others of authority inferior only to legislation.

These are judicial precedent and custom. Only in the absence, then, of a rule derivable from legislation, precedent, or custom, may a court seek guidance for its decision in other sources of law. These latter may, by way of contrast with those having a legally recognized imperative authority, be spoken of as persuasive sources.

7. **Custom.**—Historically the first of the sources of law is custom. In the earliest times the principles guiding the judges to their decisions were probably, even by the judges themselves, without conscious formulation. But the basis of their decisions was, nevertheless, doubtless the implicit notion that conduct which was customary was just, and that which departed from the recognized and popularly approved practice of the clan or other group was unjust and hence to be disapproved. The body of popular custom known to the judges was thus in this sense the first source of law. But in another sense, also, custom is a source of law, resorted to occasionally even in a well-developed legal system. Where judges have found that the members of society in general or some particular part of it have been following in their relations with each other a particular mode of action, they will adopt this custom as the rule of right action under the circumstances. Thus, the custom of allowing three days of grace after the expiration of the time for payment of a bill of exchange—a custom existing among merchants—was adopted by the English judges as a part of the common law. Even in recent times the mining law of California was constituted in large part

out of the customs in force among the miners of the state. The growth of the law in modern times, however, has owed but very little to custom. Custom in our law furnishes a rule only where statute law is lacking, and only where the custom is not inconsistent with the general principles of the common law. These limitations on its field tend more and more to exclude its operation as a source of law.

8. **Judicial precedent—The following of precedent.**—It is a principle of Anglo-American law, and one of the greatest importance, that a court is bound, with but few exceptions, to apply the rules and principles embodied in former decisions in similar cases, unless these rules and principles have been changed by statute. This principle is generally spoken of as the rule of *stare decisis* (standing by the decisions). The largest part of our law, at least so far as it deals with the relations between individuals, is the product of these judicial precedents. No other system of law allows such authority to adjudication. In the civil law of European countries, for example, the opinion of a court as to what rule should be the ground for a decision carries weight just like the opinion of any other legal expert. It is solely on the merits of its reasoning that it makes an appeal to the tribunal having the later case in hand.

In Anglo-American law, on the other hand, as Professor Gray succinctly puts it, the peculiar force of a judicial precedent "does not lie in its accordance with the opinion of the learned, or in the fact that it is right; it is a judicial precedent not

because it ought to have been made but because it has been made."[3] In other words, courts recognize the authority of previously decided cases as preventing the exercise of their own discretion. They follow precedents which they may think ought not to have been made.

With respect to their binding force, precedents are usually divided into those which are imperative and those which are only persuasive. The former class, however, is the only one which is a legally recognized source of law. Judges are bound by it even where they disapprove of it. Persuasive precedents are really authoritative only as their merit impresses the court to whose consideration they are presented. The judges are not bound to follow them. Thus, decisions of English and Canadian courts, while they receive careful consideration in American tribunals, are merely persuasive and not binding on these tribunals. Imperative precedents, on the other hand, are of binding authority. They cannot be disregarded at all by courts subordinate to the court making them, that is, subject to reversal by it on appeal. Thus the decision of the United States Supreme Court makes a precedent which is absolutely binding on all the federal District Courts, whatever their opinion of its soundness may be. On courts of coördinate jurisdiction, on the other hand, or on the court itself in subsequent cases, they are not so absolutely binding. Such a court may disregard its prior rule in some circumstances. The only Anglo-American court which apparently

[3] Gray, The Nature and Sources of the Law, p. 188.

binds itself irretrievably by a decision is the British House of Lords.[4]

9. **The disregarding of precedents.**—It is hard to formulate exactly the situation in which a court will feel justified in rejecting a precedent which it has made. Mr. Salmond has, however, made an attempt to define such a situation by saying that if the rule is not merely wrong, but so clearly and seriously wrong that its reversal is demanded in the interest of justice, it may be overruled or dissented from.[5] This requires a balancing by the court of the evil of unsettling what has been regarded as law against the benefit of correcting the erroneous decision. If the precedent, while it still stood, has been the basis of numerous or important transactions it would be better to let it stand. On the other hand, if the rule has not been followed, but has become obsolete through disuse and changed conditions, it may be more freely disregarded.

10. **The creation of precedents.**—Hitherto consideration has been directed to the question of how a precedent once established furnishes a rule for subsequent cases. But one may well ask how did the precedent itself come to be established in the first place. The answer is to be found in the primary principle that the purpose of the court and the duty of the judge is the administration of justice. A case brought for decision must be decided, and in the administration of justice according to law it must

[4] London Street Tramways Co. v. London County Council, (1898) A. C. 375-379 (Eng.).

[5] Salmond, Jurisprudence (3rd ed.), §§ 64-65.

if possible be decided on a general principle. This principle may be found in custom, in a statute or other legislative enactment, or in a judicial precedent already provided in an earlier case. But if a case arises for which no rule can be found in any of these sources it is none the less incumbent upon the judge to decide it, and to do so if possible on a principle susceptible of general application. This principle he must seek ultimately in his own ideas of right and justice, and in formulating it he creates a new precedent. But in his search for a principle a judge is habituated to obtaining guidance from various sources, the chief of which is the analogy of the preëxisting law. Thus the rules for the control of aeroplanes may be suggested by analogies from the rules governing water craft or land vehicles. Competing analogies are likely to be presented to him by counsel for consideration, and most new precedents are essentially the selection of one of two or more possible analogies for development into a principle. In this selection the trained jurist is guided by a desire to choose the analogy which will best fit into the existing system of the law, and be most likely at the same time to work out justice in its applications.

In the accumulated experience of the courts as embodied in the reports of their decisions—now reaching into the thousands of volumes and extending over centuries of experience with actual situations—he has a guide to his own reason which is of inestimable value. It is in this aspect that one of the chief merits of our Anglo-American legal sys-

tem of adherence to the course of development of the law through decided cases becomes conspicuous. A certainty that the court, even in an untrodden field, will be guided by the judicial experience of the past, and will reach its principle of decision by lines of reasoning tested and accredited by professional usage, enables the lawyer to advise his client and the client to engage in his enterprise with confidence in the uniform and definable development of the law to cover the new situation.

11. **The persuasive sources of law in general—Legal reasoning and persuasive precedent.**—Those sources of law which have been spoken of as persuasive may perhaps be most appropriately discussed at this point, since from the point of view of the student of law they get their chief significance as the sources guiding judicial discretion where the authoritative sources fail to furnish a binding rule. It is a peculiarity of the Anglo-American system which cannot be too often emphasized, that not merely when the legislator has laid down a rule but, under the doctrine of *stare decisis,* when a court of superior authority has provided a precedent, the court cannot exercise its discretion. It is only when the question raised is an open one within the jurisdiction, when the judges are not concluded by an existing rule of law, that they may look further afield for help in the creation of a new precedent, or even in the decision of the particular case in hand. It has already been said that the chief source of guidance in such a situation is the judge's own trained reason, operating on the various analogies found in existing law

to the situation in hand, and informed by his political, economic, and ethical views. Another and valuable source of guidance is in what have been spoken of as persuasive precedents—the decisions of the courts of other jurisdictions in similar cases, and especially decisions of courts administering the same systems of law as his own. Thus, precedents from Massachusetts, though not in the strict sense of the term authoritative sources of law for Illinois, are treated with great respect in the courts of the sister state. While they have no binding force, they carry weight, not merely because of the merits of the reasoning they exhibit, but because of the reputation of the bench as expert in the law. They are taken in a measure on faith, as any expert opinion is sure to be. In this sense they are authorities.

12. **Professional opinion.**—A weight scarcely to be distinguished from that attaching to precedents from other jurisdictions is given to the current opinion of the bar of the jurisdiction itself. As Professor Gray says: "That the bar who practice before a judge would be universally or generally of opinion that a certain decision ought not to be made, although not conclusive on his judgment, ought to have and does have an influence on him, and an influence of a distinctly more stringent character than the knowledge or belief that the unlearned laity would disapprove of the decision."[6]

13. **Juristic writing.**—Again, closely allied to this form of expert opinion, is the authority of the jurist, exerted through his legal writings—commen-

[6] Gray, The Nature and Sources of the Law, § 558.

taries, criticisms, and text books. In the civil law this form of persuasive authority is of cardinal importance. In this legal system no law-conferred authority is given to precedent. There is no assumption such as prevails in our law that an earlier decision is necessarily correct. Hence one tribunal may decide a case in one way today, and tomorrow a second tribunal, or conceivably even the same one, may decide a precisely similar case in a different way. The principal check on the actual occurrence of such a possibility lies in the weight given in civil law countries to the writings of men learned in the law. In the Anglo-American system, on the other hand, the criticism and suggestion of juristic writers are available to the courts only in the cases where the creation of a precedent is possible. Often, however, their writings, through their influence on the legislature, have been the means of securing legal reform. It is frequently objected that the doctrine of *stare decisis* is an element of weakness in our legal system, an artificial weighting in favor of the reasoning processes of earlier judges, as against the judges and jurists of today. On the other hand, the very establishment of a comparative scale of values among the sources from which the courts draw their rules has its advantages in producing that certainty and orderly development in the law which is an essential to both the stability and the progress of society. Moreover, the superior weight given to decided cases as a source is not by any means a purely arbitrary thing. The principles embodied in them have been worked out under conditions

especially favorable to the production of rules of justice. The judge is not a mere theorist. He is an administrator of justice, a decider of actual cases between real men, and the responsibility of his position is concretely brought home to him by the consequences of his decisions to the litigants who stand before him. Moreover, the public nature of his office, the attention not only of his professional associates but of the community in general, which his powers as an administrator focus upon him, as well as the allied forces of professional tradition, all contribute to give a special value to the doctrine he establishes by his decisions.

It is true, on the other hand, that the enormous and rapidly increasing bulk of the case law and the difficulty inherent in the form in which it is found make the task of the jurist in analyzing, arranging, and criticizing this material more and more necessary. At those points in the system where no settled precedent prevents further judicial development, his expert suggestion is becoming increasingly valuable to the judge, and where the existing law, whether embodied in custom, precedent, or legislation, needs alteration, amendment, or repeal, as well as where it may well be supplemented by new rules, the jurist's work is of similarly valuable service to the legislator.

14. **Public policy and natural law.**—No external authority of the persuasive kind can justify a judge in disregarding his own convictions of what is required in the case before him by the various considerations of public policy and natural law, or natural

justice. He may use the experience of other jurisdictions, the opinions of the legal profession, and the theories of jurists to guide his own reason. He may well pause and reflect before he renders a decision that runs counter to the weight of this authority, but his first duty where he must create a precedent is to administer justice according to a principle which commends itself to his own judgment. This means that in the main he must be swayed by considerations of an ethical character.

But it must be recognized that the fields of law and social ethics are not entirely coincident. In the first place, because of the character of its primary sanction, the external and physical power of the state, the law must leave untouched as beyond the reach of its machinery much conduct which, though morally wrong, cannot be corrected by legal processes. This limitation on the power of legal tribunals is further emphasized by the necessary generality of legal rules and principles, which cannot take account of the special circumstances of particular cases, circumstances which may make just the difference between moral justification of an act and the absence of such justification. On the other hand this requirement of a uniform and general rule for the guidance of human conduct, makes it necessary for the legal system to provide many rules in matters morally indifferent. The classic example is the rule of the road which in America requires one to turn to the right—in England the requirement is to turn to the left. Either rule serves its purpose, which is merely to secure uniformity of conduct.

Moreover, considerations of expediency frequently produce rules which impose responsibilities on individuals quite independent of any moral considerations of desert. For example, a master, however careful he may be in the procuring of servants and the supervision of their conduct, may yet be held responsible for some injury inflicted on an innocent third person by the carelessness of the servant in discharging his duties. Considerations of these sorts may better be called considerations of public policy than of ethics. A situation must always be looked for in which neither judicial experience nor legislative prevision has provided the judge with authority to bind him or even, except in the most general way, to guide him in arriving at his decision. Hence the trained, intelligent, and upright administrator must always be a factor in the legal system. But he will more and more find aid in the necessary experimentation he is called upon to make, from materials furnished him by the research and reflection of workers in the allied fields of ethics, economics, politics, and sociology.

15. **Legislation.**—In modern times the state itself, through its special law-making organs, the various bodies possessing the power of legislation, undertakes more and more actively the direct formulation of rules for the guidance of the courts in administering justice. Precedents are created only when a new situation is presented to the court in an actual case calling for decision. Hence if the legal result of a particular transaction is uncertain because no precedent is yet formulated which settles its lawful-

ness, none but the adventurous will embark on it. Legislation can resolve the doubt beforehand, and enable a man to know with greater certainty what his rights and duties with respect to the contemplated transaction will be. Thus legislation is the chief instrument by which a regular and systematic development of the law, keeping pace with economic or social changes, is possible.

Moreover, legislation can repeal or amend for future cases the rules formulated by custom or judicial decision. Unlike these latter sources of law, it can change as well as create law. If a customary or judicial rule is deemed to work injustice because of changed social conditions or because of changed ideals of justice, an act of the legislature can abolish the rule and substitute a new one. Thus in several states the judicially formulated rule known as the "fellow servant rule," to the effect that a master is not responsible to one employee for injuries caused by the negligence of a fellow employee, has been abolished, and in others materially altered, by statute.

16. **Interpretation of statutes.**—As has already been pointed out,[7] the very letter of a statute has the force of law. Hence the courts are frequently called on to decide what the legislature meant by a particular form of expression. In this task it is the duty of the court to look first to the letter of the act in question: the literal meaning of the words and phrases used, together with any light thrown on the matter by the context. If a single and definite meaning can thus be arrived at it must be declared by the

[7] § 2.

court to be the law. The court has no authority in such a case to go behind the letter of the law because of a belief that the law is unwise, or even that it did not accurately express the intent which its makers had in mind.

If, however, the letter of the law is ambiguous or inconsistent, it is then the duty of the court to seek to interpret it by inquiring as to the spirit of the rule and the relative consistency of possible reasonable interpretations with the legal system as a whole and with the requirements of justice which the system aims at. Here, too, the object of the court is to arrive at the meaning which the lawmaker had in mind, but since literal interpretation is insufficient to disclose that definitely, recourse is had to the presumption that the legislature intended to promulgate that rule which seems to the judge the fairest and wisest of all the possible interpretations of which the language of the statute is, in his opinion, susceptible.

Further than this genuine interpretation cannot go. The courts must not, under the guise of interpretation, try to make the legislature say what it has not meant to say. But it is often true that the legislature had not at all in mind the particular point in litigation. No genuine interpretation of its intention is then possible, since it had no intention. The case before the court must, however, be decided; and for this purpose the court must supplement the defective statute by a rule formulated precisely as precedents are formulated where the existing body of law provides no rule for decision. It is mislead-

ing to call this process interpretation. It is really judicial law-making.

17. **Relative contribution of the sources.**—In spite of the fact that the direct creation of legal rules by the legislative organs of the state is the most conspicuous feature of modern law-making, the legislative activity has been in the main directed to the organization and administration of the government; to regulations of a public character, such as provisions for the collection of the revenue, for the maintenance and regulation of public highways, the licensing of special trades, and other administrative acts. In the great field of private law regulating the relations of individuals with each other, a field from which the vast majority of the every-day subjects of litigation arise, our legal system is still essentially the product of judicial decisions. Legislative invasion of this field is in the main only for the purpose of amendment of detail.

Moreover, the Anglo-American law has hitherto been curiously inhospitable to legislative innovation in the system developed by the courts. Legislation, before it can become a part of the system, has to be interpreted by the courts, and there has been a tendency, at least during the last two centuries or more, to make the interpretation such as will produce the least possible alteration in the body of principles already developed. A conspicuous instance of the discrimination against legislatively made law is the refusal of the courts to indulge in such analogical reasoning from legislation as they employ in devel-

oping new rules from judicially formulated principles. At present in Anglo-American law, a statute is never reasoned from. It is interpreted only according to its letter. Doubtless this attitude of the courts has in great measure been justified by the character of much of the legislation of the past, due to the conditions under which it was produced. But it is scarcely to be expected, nor is it to be desired, that this conservatism shall be permanent. Not only is scientific legislation by a specialized law-making organ of the state theoretically possible, but the experience of other countries, conspicuously Germany, shows that this possibility may be realized. When such a time arrives, legislation may well be recognized as capable not only of correcting errors and amending details of judicially formulated law, but also of introducing new principles or altering the old, where, under social conditions essentially different from those in which they were first developed, they have ceased to work out justice.[9]

18. **Codification.**—In many jurisdictions attempts have been made to reduce the whole legal system to the form of enacted law. This is spoken of as codification, and the result as a code, though the term is often less accurately applied to any logical arrangement of the statutory law of a jurisdiction. In other jurisdictions a partial codification has been made of particular portions of the law, such as the law of negotiable instruments, of sales, and of partnership.

[9] See for excellent discussion Pound, Common Law and Legislation, 21 Harvard Law Review, 383, and compare Carter, J. C., Law, Its Origin, Growth, and Function, 204-220.

In certain civil law countries, notably Germany, this work of codification has been done with great thoroughness. In the United States several states have more or less complete codes; New York and California are conspicuous examples. At least thirty states have codified the law of civil procedure. Of course modern schemes of codification do not contemplate the abolition of precedent as a source of law. It is generally recognized that no prevision of the development of society is adequate to the task of providing beforehand for all possible contingencies involving a need for law; the trained administrator of the code must constantly supplement it by the same processes by which the judge now creates precedent and extends the common law. But the code would provide him with a simplified and modernized system of general principles from which could be made a new start for judicial development.

The advantages of codification planned and executed along right lines are obvious, especially in the United States, where the judicial and statutory development of the law in nearly fifty separate jurisdictions has emphasized not merely its enormous bulk, becoming more unmanageable daily, but also its other defects of lack of orderly and complete development in individual jurisdictions, and of anything like uniformity between different jurisdictions —a serious defect in a country becoming more and more a commercial and industrial unit. On the other hand, the great practical difficulties in the way of codification are also obvious: the lack of scientific knowledge of our complex and highly elaborated law,

and the impatience and lack of training of the legislatures whose aid would be necessary in enacting into law a drafted code. But while the conclusion seems clear that a successful codification of the common law requires much patient and careful preliminary work, study, and probably experimentation, it is also clear that this is a goal toward which progress must be made.

CHAPTER III.

THE SUBJECT MATTER OF LAW.

19. The law and interests.[10]—The end of law is the adjustment of human relations in accordance with the ideal of justice held at the time by the community. The need for adjustment arises because of the conflicting interests of the individuals and groups brought into relationship by the existence of a community in which they must live their lives together. Each of these individuals and groups of individuals seeks the satisfaction of his desires,—makes claims upon society for their realization. These claims on society may be, first, personal, for the protection of a man's health, his physical integrity, his reputation, or his family relationships; or, second, economic, for the protection of his property or his contract relations with others. A man's interests are as manifold as his desires. They include all that he claims and strives to obtain for himself.

It is the task of a legal system to decide which of these claims are reasonable and so far as it is possible by the means at the disposal of the court, to enable the realization of those deemed reasonable. The development of a legal system, then, takes place through, first, a selection of the interests which it is felt that the law should recognize and secure as a

[10] The author wishes to acknowledge his special indebtedness in the preparation of the sections on interests to the class room discussion of Professor Pound of Harvard University Law School.

means of assuring social progress; second, the adjustment of conflicts between these interests; and third, the devising of appropriate means to give effect to them, so far as legal machinery may be successfully employed in so doing.

20. **Classification of interests—Individual interests.**—The human interests which the law thus recognizes, defines, and seeks to effectuate are either interests of the individual,—individual interests; of the state,—public interests; or of the community generally,—social interests. Of these interests the legal systems of the present day are the most concerned with those of individuals, though originally the group interests, those of the clan or family group, were paramount. The interests of individuals which have secured legal recognition and protection may be classified as personal and economic. In the former would be included all the demands the individual might make and claim to have secured to him by law by the virtue of his personality independent of any proprietary or other economic relations. Thus, much law is concerned with defining and protecting for the individual his interest in his own bodily integrity and health, his interest in the uncoerced expression of his will, his beliefs and his opinions, his interest in the freedom of his honor from insult, his interest in the personal relations with his family and the social group of which he is a member. Not only is much of our present law concerned with these interests of personality, but much of law now in the making deals with them. Problems in this field are especially difficult as well as numerous because of

the intangible nature of the interests involved, the practical difficulties in the way of ascertaining the facts where imposture is easy and hard to detect. Many of the interests of personality do not lend themselves so readily to enforcement by general rule as do interests of substance, and a wider discretion must be left to the courts in order that injustice may not result from the application of general and rigid rules to cases essentially incapable of reduction to general principles. The law of domestic relations and much of the law of torts deal with these interests.

The other large division of legally recognized interests is the economic one—the claims of the individual to economic advantage,—control of corporeal things, or of intangible property on the analogy of tangible property, freedom of industry and contract, and profit from transactions or other relations with others. The law of property and of contract and of business association such as agency, partnership, and corporations deals with these interests. These economic interests are more susceptible of treatment by the legal device of general rules than are interests of personality, and hence are on the whole more satisfactorily protected in our legal system.

21. **Public interests.**—The law is concerned also with the protection of the interest of society as politically organized in the state. Originally in Anglo-American law the interests of the state were probably the personal interests of the sovereign—his kingly prerogatives; but now the state is regarded as itself a legal person, with interests of personality

and substance analogous to those of the human individual, and also with representative interests as guardian of the interests of society generally, all the interests of the community as such. These interests form the field of international law, a part of constitutional and administrative law, as well as the law of public corporations.

22. **Social interests.**—Apart from those of the community as politically organized in the state, there are other social interests which the law recognizes and protects. Indeed, the primary interest for the protection of which the law originated was the interest in general security—the safety, peace, and order of the society. This was the primary, as indeed it is the ultimate end of the law: the assurance of the conditions of social progress. To attain this end experience has shown that individual interests must be recognized and secured, but after all only as means to an end which is larger than the protection of individual interests as such. Society is interested in the preservation and development of general morals, of social institutions, and of natural resources. The criminal law which protects this interest in the general security, is the earliest and most complete development of the legal protection of a social interest. All other recognition of such interests in the legal system is comparatively recent, and correspondingly undeveloped. Most of the legal rules designed for the furtherance of social interests exist at present only as elements limiting or qualifying individual interests, as is shown by current classifications of legal rules. Thus the law of

nuisances is generally treated as a branch of the law of torts.

23. **Balancing of interests.**—The social interest is the chief incentive to the balancing of interests. Not all interests can be secured; it is therefore the task of law, by reason and experimentation, to work out that balancing of interests which will consort most fully with the ideal of justice held by the society of the period, and will most fully satisfy the socially valuable interests of the members of the community. Thus, for example, the social interest in the institution of marriage must be balanced against the individual interests of the parties to a marriage, in elaborating the law of divorce. The balancing of the interest of society in the health of its members against the individual interest in freedom of contract determines the law governing hours and conditions of labor.

24. **The securing of interests—Legal rights and duties.**—Besides determining what interests shall be recognized by law, and within what limits a just balance of conflicting interests will confine this recognition, a legal system must also work out means for protecting and securing these interests. The Anglo-American system in order to do so regulates human action in two ways. It lays duties on individuals to act or to abstain from acting in certain ways, and enforces this action or non-action by invoking the force of the state where necessary to secure obedience. It also confers advantages on individuals in the way of permission or assistance from the law to the realization of their interests.

Duties are either absolute or relative. Absolute duties are those imposed by law to protect the social interest in the peace, order, and well-being of the community in general rather than to protect individual interests against infringement. Relative duties are those corresponding to a right conferred or recognized by law for the purpose of benefiting a particular individual. The same violation of duty by wrongful act or omission may infringe both social and individual interests, and give rise to a liability on the part of the wrongdoer which is both civil and criminal, violating as it does a duty corresponding to a right of a definite individual or individuals and a duty which has no corresponding right conferred by law in the interest of any particular individual. The rules of criminal law are rules imposing absolute duties and making them effective by prescribed punishments.

The advantages conferred by law on individuals are of three chief kinds, distinguishable as rights, powers, and privileges, although all three are often spoken of generally as rights. A legal right of one man in the strict sense of the word corresponds to a legal duty in another or in others. It is a capacity sanctioned by law in the former to cause or restrain certain action by the latter. Thus, if A has made a legal contract with B, he has a legal right to have B fulfill it, which the law will lend its aid to enforce either specifically or by way of compelling B to compensate A for non-performance. B's duty corresponds to A's right.

But the law may confer advantages on A to which

no corresponding duty exists. For example, it may allow A to bring an action against B to compel him to perform his contract. This so-called right of action corresponds to no duty in anyone else. It is properly a power conferred by law on A to enable him to realize his interest in the contract. Of the same sort of legal advantage are the power to make a will, the power to dispose of property, the power to appoint an agent. In essence these powers are legally conferred abilities to create or alter or destroy rights and duties either in oneself or in others; thus, when A exercises his power to dispose of property and sells it to B, he creates in B rights of ownership, duties corresponding to which are laid by law on the community of men in general.

A third type of legal rights of recognized advantage is the capacity to act without legal restraint or liability in ways that but for the exemption granted would constitute a violation of a legal duty. Such an advantage is spoken of as a privilege or liberty. Thus, in self-defense one is privileged to use force against another which but for the liberty of self-defense would be an infringement of his right to physical integrity. Again, if A has given B a license to cross his field, the law recognizes in B a privilege to do that which without the license would be unlawful. A privilege differs from a right in that no duty in others corresponds to the privilege in its possessor. The license granted B imposes no duty on A. A can revoke it at any time. Its sole effect is to enable B to do what without it would be unlawful. Again, a privilege differs from a power

in that the exercise of it cannot violate a legal duty of its possessor. The possessor of a legally recognized power may, by its exercise, violate a legal duty. For example, B may have engaged A to work in his store for a year. He has the power to discharge him without excuse in a month, and the discharge will be given legal effect. A is no longer B's employee, and cannot act as such. But the exercise of the power nevertheless violated a duty which B owed A under the contract, and B will be liable for this violation.

Of these three legally conferred advantages, rights are by far the most common and most important. It is with the protection of interests by means of rights and duties that law chiefly concerns itself.

25. **The elements of rights and duties.**—Every right conferred by law is a right belonging to a person and operative against a person or persons. So, every duty imposed lays an obligation on a person or persons in favor of another person. The person for whose legal advantage the right is conferred or recognized is spoken of as the owner or subject of the right; the person on whom the duty is imposed, as the person obliged, or the subject of the duty.

This duty is an obligation to act or refrain from acting, which the owner of the right is entitled to exact from the subject of the duty. It constitutes the content of the right. Moreover, the act or abstention relates to some object, material or immaterial, in respect to which it exists—the subject-matter of the interest to satisfy which the owner of the right exercises it. Thus, for example, if a man

purchases a horse he becomes the subject of a right in the horse. The subjects of the corresponding duties are persons in general; for such property rights as arise from the purchase are rights against everyone. The duty imposed is one not to interfere with the owner's exclusive use and enjoyment of the horse; and the horse is the object of the right.

26. **The classification of rights—Rights in rem and in personam.**—The most important classification of legal rights is based on the incidence of the corresponding duties—whether they bind people generally or only particular persons. In the example above, the right of ownership involved was one which imposed an obligation on all persons not to infringe upon the owner's interests in the horse. Such a right, good against persons generally, is called a right in rem (literally, a right in respect of a thing). If now the owner of the horse hires it out to X for X's use, his interest in the contract is legally protected by a right available not generally, but only against X, a particular person. This right is called a right in personam (literally, a right against or in respect to a person).[11] The importance of this distinction is well pointed out by Mr. Salmond:[12]

"The law confers upon me a greater advantage in

[11] The literal meaning of the terms is apt to cause confusion without a rather complicated explanation of the history of their application to the rights. It is perhaps unfortunate that the use of the terms is so general in the vocabulary of the law that others cannot well be substituted for them. The student must hold fast to the real distinction involved rather than to the literal meaning of the Latin phrases: a right in rem is a right against men in general; a right in personam against one or more particular individuals.

[12] Salmond, Jurisprudence (3rd ed.), § 81.

protecting my interests against all persons than in protecting them only against one or two. The right of a patentee, who has a monopoly as against all the world, is much more valuable than the right of him who purchases the good will of a business and is protected only against the competition of his vendor. If I buy a chattel, it is an important question whether my interest in it is forthwith protected against everyone, or only against him who sells it to me. The main purpose of mortgages and other forms of real security is to supplement the imperfections of a personal right by the superior advantages inherent in a right of the other class. Furthermore, these two kinds of rights are necessarily very different in respect of the modes of their creation and extinction. The indeterminate incidence of the duty which corresponds to a real right, renders impossible many modes of dealing with it which are of importance in the case of personal rights."

A substantially similar primary classification of rights is that made by Blackstone,[13] who divides rights of persons into absolute and relative. Absolute rights he defines as those which belong to men merely as individuals, and which every man is entitled to enjoy whether out of society or in it. Relative rights are those incident to men as members of society and standing in various relations with each other. Under the former class he includes what he calls the primary rights of personal security, personal liberty, and private property, and certain auxiliary rights designed to preserve the principal ones

[13] 1 Blackstone, Commentaries, pp. 124 and following.

from violation. Under relative rights he classifies the rights which arise out of public relations to the government, and private relations of which he enumerates master and servant, husband and wife, parent and child, guardian and ward, and relations with corporations. This analysis of relative rights is obviously unsatisfactory, since it fails to take into account such important legal relations as contract and quasi-contract. The underlying idea of the classification into absolute and relative rights has, however, been elaborated by others, notably by Professor Langdell,[14] who follows Blackstone in calling the rights of personality and property absolute rights, but defines relative rights as those which arise from duties or obligations owed by determinate persons.

27. **The classification of rights, continued—Primary and remedial rights.**—Another important classification of rights is that into primary and remedial rights. Primary rights are conferred and recognized by law for the protection of interests generally. Once these rights are created they themselves become interests, for the fulfillment of which the law creates a secondary line of rights properly called remedial. Thus, A has a right in rem to the undisturbed enjoyment of his land, and a right in personam to the fulfillment of his contract with B. These rights are primary. But if X trespasses on the land, or B breaks the contract, a secondary right is conferred by law on A to protect his interest in his primary right. Indeed, even if the wrong of X

[14] Langdell, A Brief Survey of Equity Jurisdiction, pp. 219-259, especially at 219-222 and 229, 239-240.

or B is merely a threatened one, a preventive remedial right will be granted to forestall injury to the interest in the primary right.

These secondary rights are, then, either preventive or curative, depending on whether the violation of the primary right is merely imminent or has already taken place. The chief forms of preventive rights are the process of binding over to keep the peace and the process of injunction. Curative rights may be specific or compensatory. Specific relief aims at the production or reinstatement of the condition which would have existed had the violated primary right been fulfilled. Thus, if X has taken wrongful possession of A's property, the law may give A a right to restitution; or if B refuses to turn over to A land which he has contracted to sell to A, the law may compel from him a specific performance of his contract. Compensatory relief substitutes for the primary right which has been violated pecuniary compensation for the loss the violation has caused the owner of the right. Thus, if B, who has contracted to paint A's portrait, refuses to do so, the law will give A pecuniary damages by way of compensation. It is obvious that these three forms of remedial right are not all equally effective. The only entirely adequate one is the preventive remedy; specific redress comes next, and compensatory relief is often only a rough approximation to a protection of the interest involved.

28. **The law of procedure—Adjective and substantive law.**—Not only is it necessary for a legal system to define the interests which it will recognize

and protect, and the rights and duties by which it will effect these ends, but it must also provide a regular and orderly procedure to govern the legal process through which this administration of justice according to law shall attain its purpose in the individual cases presented to the courts for decision. This normally involves, first, the provision of a method by which the parties whose conflicting interests require adjustment may come or be brought before the court for the hearing and decision of their case; second, a method by which the exact question or questions at issue between the parties to the suit may be definitely formulated for decision (pleading); third, a method by which the trial of this issue may be conducted in a way best adapted to securing a just decision, especially how the facts necessary for such decision may be introduced and proved (evidence), and how the legal arguments which may help the court in arriving at its decision may be presented; fourth, a method of formulating and promulgating the decision; and fifth, a method of executing this decision by the force of the state if it is not voluntarily obeyed by the parties. The law thus governing the means by which the administration of justice according to law attains its ends is the law of procedure, or, as it is often termed, *adjective law.* It is thus contrasted with the *substantive law,* the law which deals with the purpose and subject matter of the legal system.

CHAPTER IV.

CLASSIFICATIONS OF LAW.

29. **Logical and practical classifications—In general.**—Numerous attempts have been made to classify the enormous mass of legal rules and principles which constitute a legal system, in order to make it more understandable and more easily mastered. If the purpose is primarily scientific, the attempt is to make a logical classification of the material so that the groups of rules shall be mutually exclusive. On the other hand, if the purpose of the classification is primarily practical—to make the rules applicable to a given situation easy of access—considerations of logic give way to the desire to secure ease of reference. Hence, classifications designed for the use of lawyers in practice divide the law into numerous groups of closely related topics, the boundary lines of which are drawn with more regard for practical convenience than for logical accuracy. These groupings, however, are by no means arbitrary. At bottom they are logical; but historical reasons and the test of practical use have led to modifications which disguise in some measure their underlying scientific character. Thus, the usual classifications of law are based on the nature of the relations with which each department of the law deals. Law is first divided into international and national or municipal law; the former being the system of rules and principles

governing the relations between independent states, and the latter the system regulating relations within a single state. This municipal law is again divided into public and private law, the former dealing with the structure and functions of the state and its relations with individuals, and the latter with the relations of private individuals and groups with each other. The division into substantive and adjective law, just discussed, applies to both public and private law. Each has its substantive rules of justice and its procedural rules for their orderly application and enforcement.

Public law includes constitutional law, dealing with the organization and larger functions of the state, and administrative law, dealing with the relations arising between the government and individuals in the exercise of the various governmental functions. Criminal law, which deals with the absolute duties of the individual to the community, is generally treated as a branch of public law, since the protection of these community interests is in modern societies entrusted almost entirely to the state.

Private law is generally divided into the law of persons, the law of things or property, and the law of obligations. This classification is based on the nature of the rights considered in each subdivision. The law of persons treats of those rights in rem which protect the personal interests in life, physical integrity, health, and honor, in personal liberty and in various personal relationships—for example, the domestic relationships of marriage, parentage, and guardianship, and those other relations which in-

volve status or legal disability of some sort, such as infancy, alienage, and lunacy. The law of property deals with those rights in rem which protect the economic interests in ownership, possession, and kindred relations to things material and immaterial. The law of obligations is concerned with the rights in personam which protect the interests in legal agreements (contracts), or which are granted remedially by way of prevention, enforcement, or compensation where a preëxisting right in rem may be or has been violated. The law of torts and quasi-contracts, and much of the law administered in proceedings in equity, are concerned with these rights in personam.

These are the general divisions of our legal system; but for the purposes of ready reference further subdivision is required in those departments of the law which have been most elaborately developed; for example, that part of the law of obligations dealing with contracts, which in a highly organized industrial and commercial civilization has been worked out by the processes of litigation and legislation into great detail. Thus, besides a general law of contracts embodying those rules which are of fundamental importance and general application, there are special laws governing contractual obligations created in sales, insurance, agency, bills and notes, and other special relations, originating in agreement but having legal peculiarities due to the essential nature of the relation or to historical reasons connected with the legal recognition of the particular interest involved.

In covering the field of our Anglo-American legal system, this commentary adopts in its articles the practical division which legal experience has proved most usable; but in its arrangement and grouping the careful student may observe its conformity to the analytic classification on the basis of the nature of the rights involved in each branch of our system of the law.

30. **Systems of law—The common and the civil law.**—Different civilizations have developed different systems of administering justice according to law. In the western world, however, two great systems divide the field. These are usually designated as the civil and the common law.

The civil law prevails over all Europe except England, Ireland, and Wales, and over all the Americas except the United States and Canada. In the United States, Louisiana, Porto Rico, and the Philippines are under legal systems derived in the main from the civil law; and the same is true of Quebec in Canada. In general the division is one between the English-speaking world and the rest of western civilization. Of the British colonies, Ceylon and South Africa are under civil law, and India under the common law, with some concessions to Mohammedan and Hindu law.

The term "common law," however, besides this use to distinguish the Anglo-American legal system from the civil or Roman law system, has at least three other more restricted meanings. Within the Anglo-American legal system the expression "common law" is used to distinguish the unenacted law

developed in courts of justice from the law established by legislatures. Thus, the common law is set off against statute law. Again, a distinction is made between "common law" and equity. The latter term, as will shortly appear,[16] is applied to the law developed and recognized only in the English Court of Chancery and its American analogues. When set in contrast with this, the common law refers to all the law, enacted or judicially developed, which is recognized and administered in other courts than courts of equity. In still another usage the term "common law" is used to designate the general law of the land as contrasted with various forms of special law, which have a limited application, such as local customary law, the canon law, or the law merchant.[17]

One must note that, in the largest use of the term, the common law, as a body of rules and principles for the administration of justice, distinguished from the civil law, is not the physically sanctioned law of any particular state. In a sense it is true that there is one common law of Massachusetts and another of Illinois. But, with the exceptions already noted of Louisiana and our insular possessions, there is a single body of principles common to all our jurisdictions; a body which in the main has been received by these jurisdictions as their particular sanctioned law, and which, by its influence as a source of persuasive authority and a training ground for legal thinking, maintains a general conformity to the

[16] See §§ 60, 61, 77.

[17] For explanation of these terms see §§ 63, 68.

original English type in all the independent jurisdictions where justice is administered according to the common law.

SKETCH OF ANGLO-AMERICAN LEGAL HISTORY

CHAPTER V.

THE BEGINNINGS OF LAW.

31. **Introductory—The relation of English history to the English law.**—No legal system can be fully explained on merely logical lines, and the Anglo-American system is perhaps peculiarly dependent for any complete understanding of it on some knowledge of its historical development. The diligent student of the common law will not rest satisfied until he has mastered in some detail the political and social history not only of his own country but also of England, the land in which this law had its early development. Here only the merest preliminary outline of the more definitely legal history, and particularly of the origin of legal institutions, can be attempted.

32. **The Anglo-Saxon beginnings.**—In its main body the Anglo-American law is almost purely Germanic. Of any direct influence of the aboriginal Celtic stock, or even of the Roman occupation of Britain, no perceptible trace remains. Our law begins with the English, the Teutonic conquerors of

England from the Britons. But of the period before the Norman Conquest materials for legal history are naturally meager. Early law is, as we have seen, largely customary in origin. Its rules, therefore, are fresh in the common memory, and there is little need of reducing them to writing. Thus the first written laws which have come down to us from the Pre-Norman period are those of Ethelbert of Kent, which date from about 600 A. D. These and the laws of Ine of Wessex, coming from toward the end of the seventh century, are in the main mere tariffs of compositions for injuries; for example, one of Ethelbert's laws runs: "If one man strike another with the fist on the nose, three shillings." As the various tribes which divided England among them became united into a single nation, their more or less varying customs had to be brought into harmony; and the first laws of all England, those of the great Alfred, coming in the latter part of the ninth century, are fuller and somewhat wider in scope. But throughout this period the purpose of the law, so far as its written forms disclose it, seems to be little more than an attempt to maintain the peace. The effort at first is merely to restrict, and then later to put an end to, the practice of private vengeance and self-redress. The injured person must demand justice before he takes revenge himself or seizes property wrongfully detained from him. The money composition set for an injury is meant to provide a substitute for the satisfaction obtained in wreaking vengeance on the wrongdoer. So the price fixed is proportioned not to the actual injury done,

but to the intensity of the desire for vengeance which must be bought off. Thus the penalty for a black bruise was greater if it was where it showed than if it was hidden under the clothing.

Spots where the peace will be preserved by the power of the state emerge from the welter of the feud like islands from a flood. The claim of the church is recognized in Ethelred's law: "Be every church in the peace of God and of the King, and of all Christian folk;" in Alfred's ordinance recognizing the special sacredness of the holy days; and in the provision for sanctuary, granting safety from the avenger to one who has escaped to the hallowed spot. The state is similarly recognized. Men going to and from the public assemblies must be free from molestation, and not only the king, but those in his presence as well are protected by the imposition of a heavier composition for offenses against them.

But the enforcing machinery of the law is at first conspicuously weak. We are not yet far removed from the time when the popular tribunal which is the ancestor of our modern court decided only such disputes as were voluntarily submitted to it by the parties. The Anglo-Saxon court had little power to compel submission to its jurisdiction or obedience to its judgments. The injured party must himself summon his adversary into court. If he did so in due form he was permitted to seize cattle belonging to the adversary as a security that the latter would attend the court to answer the plaintiff's complaint. Did this fail to induce his appearance, the only measure left to the court was formally to pronounce

the recalcitrant outside the protection of the law. Judgments by default were unknown. Similarly, if, after a judgment was pronounced against him, the losing party did not pay the composition set, or return the chattel adjudged to be his adversary's, or was otherwise disobedient, the successful party was left to his own resources, but permitted to exercise the immemorial rights of private vengeance or self-redress to which these previous proceedings had interposed a temporary check.

The Anglo-Saxon courts were not specialized tribunals for the administration of justice. Their members were neither professional judges nor lawyers. The courts were the popular assemblies by means of which all the functions of government, so far as they were then developed, were performed. In each locality the Hundred Moot, composed of the freemen of the neighboring settlements, met for deliberation on local affairs, and among these the settlement of what we would now regard as matters of law for the courts. The freemen were bound also to attend the less frequently convened Shire Moot where they decided matters for this larger area. The meeting was presided over by the local nobleman or bishop, but the decisions were rendered by the meeting itself. The Witan or Council of great nobles who advised the king also exercised judicial powers among their other functions.

The latest laws we possess from the Pre-Norman period are those of Cnut, the Danish conqueror, 1016-1035. They disclose a development in the law which parallels the increased power of the central

government. Certain offenses are now treated, wherever committed, as offenses against the king, and are punished, not by compelling a payment to the injured man or his kinsfolk, but by the infliction of corporal punishment on the wrongdoer—mutilation or even death. In other words, a real criminal law is developing. Again, certain places—like the king's highway, and certain persons—like his immediate retinue, are under the king's special jurisdiction. Another evidence of the growing power of the king is traceable in the beginnings of a system of allotment by him of land from his private domain to his followers on condition of their performing various services to him. This system of tenure, elaborated under the Norman kings, lies at the foundation of much of our real property law.

To sum up, the Anglo-Saxons had developed the conception that the object of law was the maintenance of peace and order in society. Their political organization, however, long weakened by internal dissension, and then by the menace or actuality of foreign invasion, failed to develop a strong state to support the legal system by a vigorous sanction.

33. **The effects of the Norman Conquest.**—No definite break with the English law marks the Norman Conquest of 1066. Indeed, the Norman kings sought to placate their English subjects by promising them the benefits of their ancient law. But the necessities of administration, the task of holding the throne against danger from a powerful and rebellious set of great nobles, as well as from rival claimants to the kingship, and the menace of a peo-

ple restless under what was after all a foreign yoke, and one which the royal expenditure pressed heavily upon their shoulders,—these factors insensibly but none the less thoroughly altered the fabric of the English law. The chief clue to the changes during the two centuries following the Conquest is to be found in the effort of the kings to make their hold on the kingdom first secure and then profitable.

34. **The feudal system.**—His position as conqueror of England by force of arms gave to William I. an unexampled opportunity of elaborating for his own advantage the system of feudalism. Already not unfamiliar to the England of his day, it received in his hands and those of his sons such extended development that practically all the land of England came to be held by a feudal tenure, and the whole English people was organized on a feudal basis. As lord of all the land William granted to his followers and supporters rights of lordship over it on condition of their rendering him service, paying to his treasury an assessment proportioned to their holdings, and pledging their loyalty to him in war and peace. Those men who received their lands directly from the king subdivided them among their own followers, exacting similar duties from them, and this partition was repeated until the lowest in rank among the free tenants was lord of but a few acres. But, since all free tenants, besides the duty of homage or loyalty to their immediate overlord, were bound in fealty to the king, the rules of their tenancy came in the course of time to be settled by the decisions of the royal courts, and so were rules

which prevailed throughout the whole kingdom and constituted an early element of a *common* law. At the bottom of the social structure were the peasantry, who worked the farms for the lords and could not sell the land they tilled or escape from their duty of service. This unfree class lay outside the protection of the king's courts, safeguarded only by the local custom of the manor or Hundred. As the incidents of the free and unfree tenures were gradually elaborated in the royal and the baronial courts, the legal aspects of the relation assumed greater and greater importance, the purely military features shrank into comparative insignificance, and the relation of tenure and service developed into the law of real property, to which are traceable many of the essential features of the property law of today.

35. **The Curia Regis or King's Court.**—A second line of the development of our legal system during this period was the centralization in the king's courts of the administration of justice. This also took place only gradually. During the Norman period the king's jurisdiction was but one of many. It was more or less vaguely recognized that, the king being the head of the whole feudal system, his prerogatives included that of administering justice to all his subjects. In practice, however, his judicial work was confined to the summary trial and punishment of those wrongs which were regarded as offenses against his honor as king, and the settlement of disputes which arose among his great lords who held land from him by direct grant—the *tenants in capite* (chief tenants). In this judicial

work, as in the administrative work from which it was as yet scarcely, if at all, differentiated, the king was assisted by his great lords, as the Saxon kings had been by the Witan.

More and more, however, this group tended to narrow down to the group of the monarch's personal followers who constituted his household, and so were in immediate and constant attendance upon his person. The multiplicity as well as the magnitude of the administrative tasks involved in the government of the kingdom, and the absence of the nobles from their wide estates, to say nothing of the conflicting interests of the king and these powerful vassals of his, naturally drove the king to rely more and more on this smaller group of household officers; and this group itself came to be called in a special sense the King's Court.

In the early days after the Conquest, they had, of necessity, been entrusted with much administrative as well as advisory authority. One principal task they performed was the raising of the royal revenue. How thoroughly their work was done is traceable in the monumental inventory of the taxable resources of the country compiled under their direction—the celebrated Domesday Book. An elaborate system of tax-collecting was gradually developed, with its administration centered in the Curia, and appeals from the tax-gatherers to it as the source of their authority gave a judicial turn to much of its deliberations. As a judicial body, too, it assisted the king in settling the duties owed him by his tenants, and in deciding disputes between these tenants

themselves. Moreover, it guarded the king's honor by visiting with swift and heavy punishment the offenses which were regarded as especially in violation of his peace.

This conception of the king's peace was much enlarged by the Norman monarchs. Not only were the king's own person and household sacred, but violence offered to any of his followers was a breach of his peace. One of the few direct enactments of William the Conqueror was his decree that all the men whom he had brought with him or who had come after him should be in his peace and quiet.

Gradually the performance of these judicial functions came to overshadow the other features of the work of the Curia, and the King's Court took on more and more the aspect of a court of law, at the same time retaining from its connection with the work of administration an efficiency in enforcing its decisions and a constancy in operation which distinguished it thoroughly from the loosely constituted Witan of Anglo-Saxon days.

36. **The local and ecclesiastical courts.**—Apart from those great causes in which the interests of the crown or of its tenants in capite were directly involved, the administration of justice throughout the kingdom generally lay almost wholly in the hands of local courts: communal, like the shire and hundred courts, and the kindred courts set up in cities and at fairs; feudal, as were a multitude of baronial and manorial courts erected as a matter of feudal right by the greater land-holders for the settlement of disputes between their tenants; and finally the

courts in which the Church administered a foreign law.

These ecclesiastical courts deserve a special mention, particularly because of their influence on certain branches of our modern law. William the Norman had, probably in return for the valued aid of the Pope in his invasion of England, recognized the courts of the Church as entitled to jurisdiction in England in matters spiritual. This recognition was very broadly interpreted by the ecclesiastics; and church courts administering the canon law, a well-defined and organized system of rules derived in part from Scripture but in greater part from Roman law, dealt with cases affecting the Church, the clergy, and such matters as marriage and divorce, wills, and the administration of the estates of deceased persons. In these matters our law is still deeply colored by the doctrines of the canon law.

37. **General view of the period.**—While English feudalism was unique in the actual power it gave to a king strong enough to wield it—a power which was most significantly indicated in the reservation of loyalty to the king which limited the homage rendered by each vassal tenant to his overlord, yet in the feudal incident of the lord's right to hold court for his undertenants, and in the Church's right to deal with all matters spiritual, a strong decentralizing force threatened the monarchy; and when a disputed succession gave an opportunity to the baronage to free themselves from the strong hand of an overlord, the wars that marked the reign of Stephen threatened a general anarchy, from which

the country was rescued only by the superior ability of Henry II. And yet to the strong political and administrative organization which William and Henry I gave to England was due the survival of the idea of law and order through this troubled time. The Normans had created a state. It remained for the Angevins to turn the state into the service of a realm-wide justice: to make the state, in other words, the efficient protector of the whole of the society under its sway.

CHAPTER VI.

THE MAKING OF THE COMMON LAW.

38. **The work of Henry II—In general.**—The development of English law owes more, perhaps, to the administrative genius of Henry II (1154-1189) than to the contribution of any other man in its history. Taught by the shameful lawlessness and disorder of Stephen's reign the absolute necessity of a strongly centralized organization of the government to maintain the supremacy of the kingly power, Henry found in the King's Court his most effective means of securing this end. In certain fields of operation the central government must have direct control, or it could not endure. In the first place, the crown must control the land, for the land was the source of the royal revenue and the basis of the whole political structure of a feudal monarchy. Moreover, the crown must assert and establish its right to punish violence and maintain order, or the country would relapse into the anarchy from which it had just emerged.

39. **The crown, the Church, and the barons.**—The powers which chiefly menaced the supremacy of the crown in these fields were the Church and the barons. These owed much of their strength to the courts in which they administered justice. To weaken the influence of these tribunals was Henry's first task. The conclusion of his long struggle with Arch-

bishop Becket, the head of the Church in England, was marked by the king's enactment known as the Constitutions of Clarendon (1164), ordinances which restricted materially the jurisdiction permitted to the ecclesiastical courts. The contest against the baronial jurisdiction was more prolonged, but on the whole more permanently successful. The king's method was partly repressive, but still more competitive. Instead of keeping the King's Court concerned merely with the disputes of the great lords and difficult of access to the common man, he threw it open to a wide variety of litigation, and by his plan of judicial itineraries brought it to the door of every Englishman, a rival of the local court bidding for lawsuits with an offer of speedier and surer justice.

40. **The older modes of trial.**—Henry's advantage over the local courts lay in great part in the superior machinery of his own tribunal, already developed in the administrative practice of that body. The local courts retained the historic modes of trial developed in the popular courts. That is, the judgment of the assembled freemen in these courts did not profess to determine the truth of a controversy. That, they felt, was a matter often beyond human power to ascertain. The judgment they rendered merely decided how one or the other party to the suit should prove his case; the three main methods in vogue being proof by oath, by ordeal, and by battle. All were appeals to the justice of God to manifest the right. In proof by oath, called wager of law, the man called upon to prove might sometimes swear to his claim or clear himself of the charge against

him by his unsupported oath. Oftener he was required also to bring a certain number of other men, called compurgators (oath helpers), who would swear that the oath he had sworn was clear and unperjured. In a conflict of sworn testimony men believed that God would vindicate the right. As Maitland drily says, "It is common knowledge that those who perjure themselves are often struck dead or reduced to the stature of dwarfs, or find that they cannot remove their hands from the relics they have profaned."[18]

The ordeal was the commoner mode of proof in cases of crime. Various forms were prescribed for different classes of men—the ordeal by cold or hot water for the lowest or servile classes, by hot iron for lay freemen, or by morsel for the clergy. In essence the ordeal of whatever kind was a requirement that the person remitted to proof by its means should successfully invoke the Divine interposition on his behalf. Thus, in the ordeal by fire the man decreed to prove his case must lift a red-hot piece of iron, weighing a pound or more, and carry it in his bare hand three paces. His hand was then wrapped in clean linen for three days, and when unwrapped must be well healed. It is clear that without a friend at court a remission of the accused to the ordeal was practically equivalent to his conviction.

To these forms of proof familiar to the Anglo-Saxon courts the Normans added another of essentially similar sort, which they brought with them from France—the institution of the judicial combat

[18] Maitland, Collected Papers, vol. II, p. 447.

or wager of battle. In this institution, in the case of a criminal accusation, the parties in person, at least when they were not incapacitated by age, sex, or physical infirmity, fought with special weapons under the eyes of the court, from dawn until nightfall, or until one was beaten helpless or confessed defeat by crying "Craven." If this result was not reached until the stars appeared, the party who had been adjudged to prove his case lost. In disputes about land a champion might be appointed to take the place of either party, as also where personal participation was, for any of the reasons mentioned above, impossible. Wager of battle was the appropriate mode of proof in trials as to the ownership of land, one of the commonest sources of litigation in medieval England.

41. **The inquest.**—Fortunately for the future of legal development, these arbitrary and extra-rational modes of proof were not resorted to in the administrative work of the Curia Regis. In ascertaining what lands were subject to the royal tax levy, and for how much, a far more efficient means had long been used. This was the inquest, an institution which had come down from the days of the Roman government of France and had been adopted in turn by the Frankish kings and the Norman dukes. The inquest was, in essence, an inquiry conducted by royal officials, originally to ascertain the facts necessary to enable the collection of the royal revenue. These officers had the power to summon before them the leading men of a neighborhood and require from them under oath (whence they were

called jurors) the desired information as to land and chattel ownership and value. An early instance of the fiscal use of the inquest in England was that which had produced the Domesday Book. But even in William I's day the king had turned this rational method of arriving at facts to judicial uses, and had commanded his sheriffs to inquire in particular cases from "the honest men of the vicinage" the facts which would enable him to settle a dispute as to the right of possession of land by one or another of his tenants. What had before been only an occasional use, Henry II now made usual in judicial proceedings where a decision turned upon a question of fact, such as the possession of land, which would be a matter of common knowledge in the neighborhood. By a series of royal ordinances known as assizes, he provided that certain questions of common occurrence in litigation, such as the right to the present possession of freehold property, should be determined by the royal courts and upon the oath of a jury of the neighborhood. Another assize, known as the Grand Assize, gave to a defendant in a suit relating to the ownership of land the privilege of refusing the wager of battle by which the matter would be decided in the feudal court of the overlord of the disputants, and submitting the question which of the disputants had the greater right in the land to a court under royal control, to be settled by a reference to a jury of the county in which the freehold was situated. The advantage of this is graphically put by Glanvil, one of Henry's legal officers and the author of the first general treatise on En-

glish law: "So effectually," he writes, "does this proceeding preserve the lives and civil condition of men that everyone may now possess his right in safety at the same time that he avoids the doubtful event of the Duel. Nor is this all; the severe punishment of an unexpected premature death is evaded, or at least the opprobrium of a lasting infamy or that dreadful and ignominious word that disgracefully resounds from the mouth of the conquered champion."

From the point of view of the king, moreover, these assizes gave him direct control over the most important sources of private litigation, disputes about the possession and ownership of land. They were supplemented by an enactment which provided that no suit as to a freehold should be commenced without the royal permission embodied in what was called a writ of right. These various ordinances of the king sapped the very stronghold of the baronial courts, since it had been of the essence of the feudal tenure of the barons that disputes between undertenants should be decided in the court of the lord of both litigants.

42. **The king's peace and the grand jury.**—The other field of law which Henry had to control was the prevention and punishment of crime. The machinery of the local authorities for this purpose—the hue and cry after a fleeing suspect, and the appeal of felony brought by a private accuser, were both seriously defective. The outcome of the appeal was likely to be a trial by battle, in which the original offense might be augmented by the wounding or

killing of the accuser. The local courts, moreover, often lacked power either to pursue or to punish a malefactor who refused to submit to their jurisdiction. Henry met the situation by making a wide extension of the king's claims to punish certain wrongs as offenses against the royal honor, and by using the institution of the inquest in this field also for ascertaining the facts as to crimes committed in each neighborhood. At first the men summoned merely answered under oath the inquiry as to what crimes had been committed and who had committed them or were generally suspected to have done so. In other words, they presented to the king's officers the information current in the neighborhood as to suspects, but did not pass upon their guilt or innocence. They were really an accusing jury, and their responses constituted an indictment which had to be followed by a trial—unless, indeed, the suspect was already of bad reputation, in which case he was punished as a felon on the mere indictment; the punishment including both mutilation and forfeiture of goods to the king. It was not until later times that there developed from this germ a separate trial jury in criminal cases.

Successive ordinances extended the list of the wrongs which the king treated as in a special sense wrongs against him. Treason, murder, robbery and theft, and later arson and false coinage, were offenses which the king asserted his right to punish in his own court by forfeiting the criminal's goods as well as inflicting death or mutilation upon him or banishing him from the realm. The vigor and

efficiency of the royal criminal justice naturally tended to reduce the appeals of felony by which private individuals sought vengeance in the local courts, and thus the conception of the crown as the guardian of the social interest in peace and order, the root of a genuine criminal law, was made familiar to the English mind.

43. **The writ process.**—Henry drew litigation into the royal courts not only by substituting an efficient mode of trial for the obsolete methods of the local courts, but also by providing for his own tribunals a better preliminary process for securing the attendance of the defendant. The older courts, as we have seen, left this task to the plaintiff; and moreover they made his performance of it difficult by prescribing with much detail the procedure he must follow to entitle him to use any force to compel his adversary's compliance. But if a man sought the aid of the King's Court, Henry lent him the power of the royal officers to bring his adversary before the judges. Here again he turned the administrative machinery of the Curia Regis to judicial ends. The king's writ, a writing from the king, was the regular means by which the court as an administrative body had directed the action of the royal officers. Now, if a man presented a good case to the King's Court, a writ issued from the chancery, one of its offices, but signed with the king's sign manual, directing the sheriff to summon the defendant into court. This royal summons no one would lightly disobey. A second value of the writ lay in the very fact that it was a written document. The

local courts had no written records. Their decisions were embodied only in an oral tradition, necessarily more or less unreliable. But a writ was the beginning of a record; it put into preservable shape a brief statement of the ground on which the plaintiff sought redress in the King's Court. If the clerks of the chancery issued it, and the judges of the King's Court recognized it as entitling the plaintiff to relief at their hands, one definite point was fixed in the law: such and such facts entitled one to relief in the King's Court. A writ once thus approved would be good in subsequent cases of similar sort. Thus by this simple means the law received one of its earliest and greatest impulsions toward uniformity and certainty. The clerks of chancery began to compile a register of the writs which had been adjudged to state good causes of action, and upon this Register of Writs was reared in later reigns the fabric of a scientific law.

44. **The itinerant justices and the court at Westminster.**—The King's Court administered a better justice than the local tribunals, but the local tribunals met regularly and near at hand. Henry's reforms were incomplete unless the King's Court were not merely open but accessible to all England. Here again Henry adapted to judicial uses an institution already in existence. From time to time the kings themselves had journeyed over the country and administered justice to those who sought their court wherever it might happen to be. Moreover, royal commissioners had been many times sent from place to place to hold inquests for fiscal and kindred

purposes. Henry experimented with a view to establishing throughout the land a regular course of visits by royal officers, representing the court and free from local prejudice or interest, to hear the pleas of the crown as well as to look after the collection from various sources of the royal revenue. From 1176 on, these commissioners, now called justices, so largely did the judicial function occupy them, were sent on regular circuits through England; and Henry's instructions in 1166 and 1176 to them and the sheriffs, who had the duty of seeing their judgments executed, may be said to constitute the initial charter of a law for all England—a real common law, professionally administered throughout the whole land and hence achieving a uniformity hitherto largely impossible.

The king's central court at his capital of Westminster, composed of his household officers, was of course the Curia Regis par excellence, but the courts held by the itinerant justices were also royal courts, administering the same rules of law. This uniformity was secured by sending the members of the central court (Curia Regis capitalis) themselves from time to time on circuit. Gradually the judicial functions of the central court became so important that we read that in 1178 the king has chosen five men, two clerks and three laymen, to hear all complaints of the kingdom; and questions they cannot decide are to be reserved for the king and his wise men. In this specialization for the administration of justice, both among the judges in eyre and in the central tribunal, we get the first distinct separation of

the judicial from the administrative functions of the royal establishment.

In fine, Henry's tireless energy and administrative genius had before his death familiarized England with a common law covering both the most important form of land tenure and the most serious breaches of the public order. Moreover, this law is administered in a way so much more efficient than the law of the local communal or baronial courts that it is likely to draw all litigation into its courts. These courts, too, have been brought to the people by an elaborate system of visits by professional judges familiar with a uniform and certain law—one for all England.

45. **Magna Charta.**—The work of Henry stood the test of the absentee rule of Richard I (1189-1199), and even of the malignant tyranny of John (1199-1216). The successful revolt which extorted the Great Charter (Magna Charta) in 1215 from John was largely a revolt of the barons, and in a measure it restored to them the judicial privileges which they had been losing under the skillful encroachments of Henry II. But on the whole the charter is more noteworthy for restoring to the people the protection of property which Henry's assizes had secured to them. Its greatest contributions were to Constitutional Law. It established by the very fact of its promulgation, as well as by the obvious implications of its language, the cardinal doctrine of English law, around which in after centuries the struggle for the liberties of the people against tyranny centered: that the king himself was

subject to the law. In the famous thirty-ninth and fortieth articles we read:

"39. No freeman shall be arrested or detained in prison or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him nor send against him, unless by the lawful judgment of his peers and by the law of the land.

"40. To no one will we sell, to no one will we refuse or delay, right or justice."

In the next reign Bracton, the second great English legal author, though himself a royal appointee as judge, could write, in language afterwards notably echoed by Coke, that the king was under God and the law.

46. **The professionalizing of the administration of justice.**—The reign of Henry III (1216-1272), despite the occupation of its statesmen with the long and doubtful struggle between the king and his personal followers on the one hand and the barons on the other, was a period during which the English law developed not only steadily but even rapidly. The political turmoil affected only the matters of constitutional law. The royal party still thought of the king's relation to the provisions of the Great Charter as that of the signatory to a treaty, bound only by his express consent, but the nation, headed by the barons, by persistently extorting re-issues of the Charter from the reluctant sovereign, gradually hardened into law the conception of the supremacy of the English constitution.

The steady progress of the common law was due

to the fact that the course its development was taking removed it from the arena of political strife. The administration of law was becoming a distinct profession; its judges were no longer mainly composed of the great men among the king's advisers, whose first interest was in statecraft. In the earlier years of Henry's long reign they were in the main clerics, who combined with a knowledge of the growing structure of English law, gained from serving as clerks in the royal courts or chancery, a knowledge also of the canon law administered in the ecclesiastical tribunals. Some elements of the Roman law, though on the whole surprisingly few, found their way into English common law in this way. As time went on, however, the professional judges were more and more frequently laymen whose knowledge of law had been gained in pleading the cause of clients at the bar of the royal courts, and who because of their professional eminence had been selected to argue cases on behalf of the crown, and finally had been elevated to the bench. In both its branches, the bench and the bar, the administration of justice was becoming a lay profession with a specialized learning, consisting in the main of the rules of adjective and substantive law followed by the King's Court.

47. **Development of trial by jury.**—The procedure of the King's Court had, by its very merits, imposed itself even upon the lower courts, and gradually the jury was developing out of the inquest. In 1216 the Church had disapproved the ordeal as superstitious, and a substitute was found for it in

criminal cases in allowing the man accused by the Grand Jury to submit his defense to a second jury of the neighborhood, who apparently came to act as triers of the case rather than as witnesses themselves. In theory, since the accused should not be deprived of an appeal to the judgment of Heaven to clear himself, the second jury acted only if the accused was willing to be thus tried, but in practice he was coerced into consent on pain of torture for refusal. By the beginning of Edward I's reign trial by jury had begun to assume something of its essentially modern character of a determination by a sworn body, drawn from the vicinage, of the facts necessary for the decision of a case. Evidence was presented to them at first probably only by way of supplement to their own knowledge. It is not until well on in the next century that the jury loses its character as a body of witnesses, and becomes purely a body of judges of the facts.

48. **Precedent as a source of law.**—Not only was a common procedure unifying the law administered in English courts, but the rules by which the royal justices determined the cases presented to them—rules which they professed at least to draw from the customs prevalent through the realm—were becoming recognized as constituting precedents for the decision of future cases. In the case of diverse customs, the one selected as just by the learned, powerful, and justly respected royal courts was likely to prevail as general law, only the most tenacious and frequently recognized local customs holding out against the leveling and unifying tendency. By this

selection and generalization of existing customs, and their establishment through a uniformly followed course of decisions vigorously enforced, there grew up in England a body of law native to the soil, familiarized by use, and scientifically developed by a learned profession. It was the existence of a strongly sanctioned and well developed native law which enabled England alone of the countries of Europe to withstand the increasing pressure brought to bear by the learning of the day upon the courts to adopt the Roman law as the standard of their decisions.

49. **Growth of legal doctrine.**—In Henry's day almost the whole law of landed property was administered in the king's courts. One great enlargement of their field took place during this reign: this was the invention of the writ of trespass, which greatly extended the protection already given by the king's courts to the possession of land through the possessory assizes. The courts invoked the doctrine that any interference, however slight, with possession not only of land but of movable property, might be a breach of that peace of the realm which it was the king's prerogative to protect. Hence, when such interference occurred, the person wronged could complain to the king and secure a writ of trespass, under which the wrongdoer would be summoned by the sheriff, fined and outlawed, and from his goods compensation awarded to the injured party. The advantages of procedure and remedy drew the business into the King's Court, and the introduction of an element of compensation to the victim as well as

of punishment indicated the beginning of the distinction between the law of crime and that of tort. More slowly and vaguely still the law of contract, aided by the processes of the ecclesiastical courts, was emerging from the writ of debt, which was a by-product of the writ of right.

CHAPTER VII.

THE ENLARGEMENT OF THE COMMON LAW.

50. **Legislation a source of law.**—Next to that of Henry II, the name of Edward I (1272-1307) is the greatest in the history of the formative period of our common law. Like Henry he was a great administrator and organizer, and he possessed something of the same legal turn of mind. His most important work was the organization of the great Council of the nation into a regularly functioning organ of the government. In his reign Parliament developed into something like its present form. To its original constituents, the great lords, both lay and clerical, Edward added definitely representatives of the other classes of his people who enjoyed political rights: the lesser barons, the knights of the shire, and the citizens and burgesses of the towns. Legislation now began to be a prolific source of law; and the conception began to grow that the accredited organ of the state in formulating new law was Parliament rather than any administrative power. The statutes of Edward's reign are of the most fundamental and far-reaching character, covering indeed the whole field of the law, private as well as public: making radical alterations in the existing law, establishing new rules, and even undertaking a systematic arrangement of the whole body of law. Their result was to elaborate and com-

plete the work initiated by Henry II. The work of concentrating the administration of justice in the royal courts was all but perfected in a notable series of statutes. The Statute of Gloucester (1278) set limits to the jurisdiction of the feudal courts over freeholders, and fixed the jurisdiction of the county courts at claims for less than forty shillings. The Statute of Mortmain (1279) forbade the alienation of any land to the Church without the consent of the king—a serious check to the growth of ecclesiastical power; and a later statute, while acknowledging a rather large jurisdiction in the church courts, established the right of the royal courts to check any excess of this jurisdiction, by a writ of prohibition. The Statute of Winchester (1285) by establishing a national system of police enabled the crown more effectively than ever before to maintain the peace and order of the realm.

51. **The limits of common law jurisdiction.**—Certain classes of cases still fell outside the sphere of the common law: those recognized as within the jurisdiction of the church courts, and those arising in foreign transactions or occurrences on the high seas—matters felt to be territorially outside the field of the common law jurisdiction, since the common law was a law for the king's subjects and the king's realm. Moreover, the crown and the Parliament never lost entirely their judicial functions. The king in council retained the power to do justice in extraordinary cases, which was a part of the original prerogative of the crown; and Parliament also derived from the council, of which it was in theory a

development, a power, at first, of original jurisdiction, to hear grave and important causes and to answer petitions. Gradually this power shrank to a jurisdiction in error from the common law courts, and became specialized in the House of Lords. The House of Lords is still the ultimate appellate tribunal of the British system.

52. **The development of the land law.**—The successful establishment of a practically exclusive jurisdiction over freehold land in the royal courts had deprived the system of tenure of most of its political significance. Land was prized as a source of revenue rather than as a source of military or political strength. Hence the interests of the king, himself the largest landowner in the realm, and of his tenants-in-chief, the greater barons, were to a large extent identical; and the land legislation of the period seems to have been designed to protect the interests of the king and his chief tenants as landlords. Two important statutes sought to prevent the utilization to the detriment of the feudal overlord of those new interests in land which had been developing as its commercial value rose into prominence. The clause De Donis (concerning gifts) in the Second Statute of Westminster (1285) favored the system, so important in English law, of entailing estates. It forbade a tenant for life from selling his estate. The land could pass only to his lawful heir; or if there were no heir it "escheated," or fell back into the hands of his feudal overlord. The statute Quia Emptores (1290)—so named from its opening words, "Whereas purchasers"—forbade subtenants to

make over the land they held to others in such a way as to retain for themselves the nominal possession and feudal incidents in the land. If they sold, they must sell outright, so that the new purchaser stood in the same relation to the overlord that the seller had occupied. Indirectly this resulted in the breaking up of the great baronial estates into smaller holdings owned by men who, though tenants directly from the king, held too small an estate to be a menace to the royal power. The land law developed in Edward's reign moulded the social and economic history of England down to the present day.

53. **The writ-issuing power.**—Another chapter of the Second Statute of Westminster (1285) throws an important light on the history of procedure. It has been pointed out that a characteristic element of the litigation in the King's Court was the writ process. A complainant could get a remedy from the royal court only if he had a writ by which the king commanded the court to do justice in such a case. As the number and variety of the cases handled by the king's courts increased, blank forms of the writs that could be issued to suit the different cases were kept by the king's secretary, the chancellor, and the clerks of his office—the masters in chancery, as they were called. These could be had by applicants for justice in the courts on the payment of fees, some of them fixed, some of them the subject of special bargains. As late as Henry III's time, a royal writ for the recovery of a debt cost the plaintiff a fourth or more of the amount of the debt. The writs framed to meet ordinary cases of

continual recurrence were, however, obtainable for a moderate fixed price. These were called *brevia de cursu* or "writs of course." For a long time the king, or in reality the chancellor and his clerks, had very free discretion in making new writs for new cases. But as it became clear that the power to make new writs was really a power to grant new remedies, that is, to make new law, Parliament, jealous of its nascent legislative functions, began to protest. Even in Henry III's reign, before Parliament was a definite body with regular sessions, the barons by the Provisions of Oxford had forced the chancellor to swear that "he would seal no writs except 'writs of course' without the commandment of the king and of his council." Further than this, the judges began to assume the right to decide on the validity of the writs on which actions were brought before them.

An attempt to mitigate the severity of this double check on the expansion of the law through the royal power to create new remedies was made by the Statute of Westminster II referred to above. One of its clauses allowed the chancellor to issue a new writ whenever "in one case a writ is found and in like case (*consimili casu*) falling under like law and requiring like remedy is found none." In later generations this clause was used to create very many new actions. Indeed the law of tort and also that of contract are in large part traceable to writs consimili casu, modeled on the earlier writs of trespass and deceit. But in Edward's own time the judges seem to have allowed but little effect to the pro-

vision made by the statute for expansion. The list of writs was treated as practically fixed, and the addition of new remedies required parliamentary action. Already was becoming apparent the tendency of the common law to ossify.

54. **The courts of law.**—Not only the substance of the law but the institutions by which it was formulated and administered assumed during Edward's reign much of the character that they were to bear until modern times. Under the need of specialization imposed upon it by the growing burden of its work, the central court of the king had been gradually splitting into three distinct courts. Even in Henry II's reign the fiscal department of the court —the Exchequer—had begun to specialize its organization for the better administration of the king's revenue, and especially for the judicial questions originating in the course of its collection. Magna Charta had provided that a division of the court should sit constantly in a fixed place for the settlement of disputes between private individuals over land and over claims for money debts or chattels wrongfully withheld; this division was known as the Common Bench or Court of Common Pleas. Originally the King's Pleas, the causes originating from breaches of the king's peace, were to be heard by the king himself, and so in theory the King's Bench was a division of the court which followed the king's person wherever he might journey. In practice, both the personal attendance, which Henry II and also John had made in a measure actual, and the migration of the court with the king's movements

about the country, ceased during the long minority of Henry III. The king came to be present at the sessions of the Court of King's Bench only by his representative, the Chief Justice. But the King's Bench retained in its jurisdiction traces of its special importance. It heard both criminal cases and the civil cases where a breach of the peace was alleged. It exercised also a control over the royal officers by means of the so-called prerogative writs which could issue from it alone. Finally it exercised an appellate jurisdiction to correct errors made by any of the judges or justices of the other tribunals, with some exceptions in the case of the Exchequer.

By Edward's time this process of division was complete, but the distinction of jurisdiction did not long remain clean-cut. Since the judges were paid out of fees of litigants in their courts, each court, imitating the method by which the King's Court had trespassed on the jurisdiction of the baronial and communal courts, sought to extend its own jurisdiction and bring into it parties seeking relief. As a result, jurisdiction in the ordinary civil cases came to exist in all three courts.

55. **The legal profession.**—The development of the courts was paralleled by the development of the legal profession. Before Edward's reign had ended the practice of law had become virtually a professional monopoly, almost wholly in the hands of laymen. Professional pleaders argued the cases before the bar of the court. Professional attorneys conducted the legal business of clients outside the court-

room. Men were apprenticed to the study of law as to a craft. When they had mastered its rudiments under the guidance of the older members of the bar, supervised, moreover, under royal order, by the judges, they were admitted to practice, and rewarded if especially and permanently successful with the title of serjeant or servant of the king's people. From the ranks of successful practitioners, rather than as in the older days from those of clerks trained in the various divisions of the king's courts, the judges were selected—men who had won their distinction by knowledge of the law and skill in dealing with it in practice. The results of this professionalizing of the administration of justice were both good and bad. On the one hand, the law was to be formulated by men whose training and experience were extensive, and moreover highly practical. The practitioners and the bench were sympathetic, and professional opinion could and did exercise a strong influence on the development of the law. On the other hand, the effect of this professional monopoly was to narrow and make highly technical the learning which constituted the preparation for practice.

A common lawyer need have no such knowledge of the canon law as the clerics of an earlier period possessed. The rules of the common law were best learned by studying the records of cases decided in the past, by observing the practice of the courts, the writs they allowed, the causes of action which might be included within the terms of these writs, and the rules governing the decisions made by the judges. To supplement and aid their memories, diligent stu-

dents made notes of the arguments of counsel and the reasons for the decisions in the cases which they heard in the courts. Collections of these notes, some of them perhaps made by young students, and others by practicing lawyers, and handed down from one to another, constitute, according to the prevailing theory, the long series of rough reports of cases known as the Year Books. In the legal text-books of Edward's time also appears the narrow and intense practicality which was valued in the legal profession. They are mere commentaries on writs or discussions of other elements of procedure. As Professor Holdsworth says: "The Common Law is becoming a special subject, known only to the practitioners of the royal courts, and the principal need of the practitioner is for some simple information as to the rules of court. The law itself lies beyond. The rank and file of the profession, immersed in the routine of practice, never attain to a conception of law as a reasonable and logical science."[19]

56. **The ossification of the common law.**—The reign of Edward marks the culmination of a great period in the history of our law. In this period the conception of the function of law had broadened from a mere preservation of the peace and order of society to the conscious provision of remedies for wrongs. Bracton laid it down as law that there was a writ for every form of action.[20] But as we have seen, even before the end of Edward's reign this was no longer true. At the moment of its precocious

[19] Holdsworth, History of English Law, vol. II, p. 272.
[20] 2 Pollock and Maitland, History of English Law, p. 564.

maturity the common law had begun to ossify. It was self-limited by technical rules as to jurisdiction which excluded from its control the foreign merchants and the growing commerce of the sea. It was unwilling to grant relief except where the wrong complained of could be brought within the purview of some established writ, either a writ of course or, if new, one sanctioned by Parliament. The development of the jury system has led, in many ways too intricate for discussion here, to the growth of an elaborate, highly technical system of pleading, the refinements of which tended to delay and often entirely to frustrate justice. The judges were jealously watched by barons and commons for fear that their decisions might be biased by the fact that they were royal appointees. The surest safeguard against favoritism was adherence to a definite and rigid rule provided by statute or by earlier decisions. Thus straitened, the administration of justice became more and more formal. If the letter of the rule was satisfied the moral aspects of the case in litigation were quite disregarded.

The substance of the law was being developed not in the large by theoretical discussion and generalization, or even, after Edward's reign, by any far-reaching legislative changes, but by very slow degrees and very short steps taken almost unconsciously: by the wresting of a rigid form like a writ of course to some new use only slightly different from the old, or with a material difference disguised under a fiction of identity, and by the gradual working out and

adaptation of principles embodied in the accumulated precedents found in decided cases. The desire for certainty in the law, the dread of judicial caprice or dishonesty, made for an aversion to change which was intensified rather than lessened by the growing influence of a trained professional opinion upon decisions.

57. **The need for elasticity.**—Yet England at the beginning of the fourteenth century was a rapidly growing nation. Edward had enlarged her boundaries and she was cherishing further political ambitions. Her foreign commerce, though still largely in the hands of alien merchants, was great and growing. The universities were the center of a vigorous intellectual life. Parliament was in the full tide of its early activity, with an astonishing list of legislation to its credit. Moreover, the new century and the one that followed it were to be centuries of the utmost social, political, and moral unrest, demanding institutions, legal as well as political and economic, which could deal with the tremendous problems of adjustment that a period of such change involved. But the courts of common law had chosen to regard as closed many of the avenues by which the past growth of the law had been achieved, and so the further development of an administration of justice adequate to the needs of the time had to be sought elsewhere.

58. **Legislation in the fourteenth and fifteenth centuries.**—Nor could the legislative organ of the state provide what was needed. The period from the death of Edward I to the end of the Wars of the

Roses is one of increasing governmental feebleness. Incompetent kings, foreign wars, and internecine strife, succeeding one another, combined to turn Parliamentary activity from constructive legislation to an ignoble participation in the history of factional intrigue and armed conflict. There are some few noteworthy statutes. In 1350 and 1360 the organization of the Justices of the Peace completed the outline of the common law control over the peace of the realm. These royally commissioned Justices absorbed the remnants of local court jurisdiction over the minor offenses we now group as misdemeanors. At the same time the statutes gave to these magistrates important administrative powers, which practically put the local government of England into their hands. Edward III's Statute of Mortmain (1390) constitutes the first recognition in English law of that important figure, the corporation, as a juristic person. Legislation was, in truth, actively enacted throughout the period. Parliament dealt with all manner of subjects in minute detail, exhibiting apparent confidence in its power to regulate by statute the price of food and labor, and the garb appropriate to the various social classes. But the statutes reflect how it had become the tool of the great nobles in their factional fights and in the preservation of their selfish economic interests, particularly against the unrest among the peasantry that began with the Black Death (1349) and came to bloody outbreak against oppression in the revolts of Wat Tyler (1381) and Jack Cade (1450). Of the legislative activity of the Parliament of Edward I's reign

we find little or no trace. "Parliament seems," says Maitland,[22] "to have abandoned the idea of controlling the development of the common law. Occasionally and spasmodically it would interfere; devise some new remedy, fill a gap in the register of writs, or circumvent the circumventors of a statute. But in general it left the ordinary law of the land to the judges and the lawyers. In its eyes the common law was complete or very nearly complete."

59. **The expansion of the law through the Court of Chancery.**—Fortunately for England, a new line for advance was opened up by the development of the judicial functions of the king's chancellor. Originally this officer was the chief secretary of the king and the head of his chaplains; originally, therefore, he was both a man of learning and an ecclesiastic. His legal importance was in some part due to the fact that his office issued the royal writs which gave to injured persons access to a remedy in the King's Court; but still more was it the result of his being the secretarial member of the king's council. It has been noted[23] that even in the fervor of Henry II's reign for the organizing of the administration of justice, some questions were not given to the courts, but were still reserved for the king and his council. This power, constituting what Sir Henry Maine calls a supplementary or residuary jurisdiction in the king and his council to grant remedies that, either through a defect in the administration of the law or a defect in the law itself, were beyond

[22] 2 Collected Papers, p. 479.
[23] See § 44.

the reach of the common law, could be invoked by petition. The council by whom were examined the petitions of those who sought this extraordinary justice of the king was a large and not very definitely limited body, composed of the great officers of state, the judges of the courts at Westminster, and an indeterminate additional group of barons and ecclesiastics summoned by the king, apparently at his discretion. In the case of civil matters at least, the task of examination devolved in large measure on the learned chancellor; indeed, by Edward I's reign many of the petitions were addressed to the chancellor directly. Gradually, in the course of the next two reigns, the chancellor's control over this extraordinary justice became so special that his office was recognized as a separate court as well as a department of state. The petitions which he entertained sought relief in a wide variety of situations: in some—such as cases of assault and battery and forcible dispossession of property—where, though the courts of law had jurisdiction, the wealth or power of the wrongdoer corrupted or intimidated a jury of his neighbors; in still others where the limitations, jurisdictional or procedural, of the courts of common law prevented the injured party from obtaining a remedy there.

At first, then, the chancellor in large part merely administered the common law in the special cases which called for summary and powerfully sanctioned justice. But the very existence of this jurisdiction was a reflection on the courts of common law. The King's Bench claimed the right to forbid a resort to

chancery if the case fell within the common law jurisdiction. Parliament, who saw in the chancellor the leading member of the King's Council, a body identified with the royal assertions of prerogative of which they were rightly jealous, at first joined hands with the older courts in opposition to interference by a royal officer with the regular course of justice. In the face of this hostility on the part of Parliament, the chancellor gradually abandoned the exercise of this supplementary jurisdiction, and it became a leading principle of the law developed in the court of chancery that where a remedy existed at common law the chancellor would not interfere.

60. **The equitable jurisdiction of chancery.**—But, as has been seen, the common law had not evolved remedies for every wrong, and it was to supplement this deficiency that chancery successfully developed its characteristic equity jurisdiction. The burdens of the feudal incidents of tenure had led to the devising during the thirteenth century of a scheme for avoiding them by conveying the land to a trustee, who agreed to hold the legal title for the benefit of some one appointed by the person making the conveyance. Under the rigid rules of the common law of land the trustee, being the holder of the legal title, was the absolute owner of the land. If he chose to disregard his promise, their writ process provided no remedy; for the obligation was a moral one, not enforcible in act of law. The chancellor, however, was willing to lend the aid of his court and its special process to the enforcement of the promise

or trust.[24] His reason for assuming this jurisdiction was probably not only because it was one in which the common law afforded no remedy, but also because it was one involving the prevention of a breach of good faith—a matter in which as an ecclesiastic he had both a moral and a legal interest, since the chancery courts had always sought, though with but limited success, to exercise jurisdiction over pledges of faith as matters spiritual. It was this insistence on the performance of a moral duty with which the courts of common law confessed themselves unable to deal under the rules governing their action, that gave to the court of chancery its name of a court of equity.

The same reasons prevailed upon the chancellors to interfere in other cases where the law in enforcing a strict legal right was really defeating the ends of justice. Cases where duress, fraud, accident, or mistake had given one party an advantage over the other which it was unconscionable to exercise, were cared for inadequately or not at all under the rules of common law. Thus where a man had given a bond to secure a debt, and had paid the debt but had failed to obtain a release of the bond, the holder of the bond could still sue and enforce it at law. In this and similar cases the chancellor gave relief by preventing the suit at law and ordering the cancellation of the bond. In time the relief granted at first in special cases where the common law rule was inadequate became a usual form in which the chancellor's equitable powers were exercised, and

[24] See subject, TRUSTS.

the field of his jurisdiction came to be conceived, though somewhat vaguely, as the compelling of conduct in accord with what good conscience would require: the enforcement of moral duties by the power of the state.

61. **Chancery procedure.**—The chancellor's jurisdiction was derived from the king's power to do justice. Hence he was not tied down, as the courts of common law deemed themselves to be, by any inflexible rules of procedure. But the nature of the cases presented to him, the summary justice which they usually called for, naturally suggested to a cleric, as the chancellor was, the summary process which the church courts administering the canon law used in dealing with heretics. Upon considering the petition or bill, as it was called, which invoked his justice, the chancellor issued the famous subpoena, which required the person complained of to appear before him in person to answer the bill, on pain (sub poena) of forfeiting a hundred pounds. When the defendant appeared, the chancellor himself examined him under oath, and without giving him a jury trial.

Thus the chancellor was not hampered by the rules of practice, pleading, and evidence which the system of a jury trial had imposed upon the common law courts; and though in time equity procedure became as intricate and technical as that at common law, it was at first eminently flexible and expeditious. Thus, for example, the common law could not deal with cases involving more than two sets of parties. It could not supervise the management of a busi-

ness nor adequately direct the taking of complicated accounts. All this the freer chancery procedure enabled the chancellor to do.

Probably the most important superiority of the procedure the chancellor introduced was in the relief he could award to the successful plaintiff. A common law judgment was an exceptionally rigid thing. It had to be absolute in terms; it could not be made conditional on the performance of some future act. With one exception it was a remedy by way of money compensation for the wrong done the petitioner. The common law could put one who had been wrongfully turned out from his land back into possession, but beyond that practically its only remedy was a judgment for money damages which could be enforced against the property of the defendant. But chancery as a court of conscience, with its attention directed primarily to the duty of the defendant, vindicated the right of the plaintiff through compelling the defendant to fulfill specifically his correlative duty. It ordered him to do the very act he was under moral obligation to do, or to refrain from the very act he was under obligation not to do; furthermore, if he were recalcitrant it threw him into prison and kept him there until he was ready to perform his duty in accordance with the chancellor's decree.

Equity or chancery could not only redress injuries which had already occurred: by means of its characteristic weapon, the injunction, it could prevent threatened injuries, and by its decree of "specific performance" secure to the plaintiff a relief often

much more adequate than any money compensation could afford him.[25]

62. **Development of law in the courts of common law.**—We have already pointed out the difficulty of further development of the law of the land by the judges and lawyers within the inflexible scheme they had created for themselves. But despite these cramping restrictions genuine progress was made. Almost the last remaining bulwark of the baronial jurisdiction was conquered for the courts of common law when they gradually took under their protection the villein tenants and made the law of copyhold a part of the general law of the land. They also recognized and protected the interests of the lessee for years, and gave to the conception of estates in land practically its final formulation.

The ingenuity of the bar was but little directed to any general development of the law. The training which both his preliminary education and his experience gave the common lawyer rendered him comparatively indifferent in questions of the historical origin of the doctrines he dealt with, but extraordinarily keen in logical disputation about them and technical refinement upon them. Often, indeed, his ingenuity was devoted to their perversion, but on the other hand it resulted in utilizing their limited number and variety to meet the new situations which this period of unrest created in increasing quantities. It is to this logical keenness and ingenuity that we owe the development during this period, by way especially of the writs of trespass and trespass

[25] See subject, EQUITY.

on the case, of the fundamental doctrines of the civil law of tort and contract, many of which still bear the marks of the cramping procedural mould in which they were cast.[26]

63. **The law merchant and the Court of Admiralty.**—The failure of the common law to cover the whole field of the administration of justice had led to another specialization of function in the king's council, which also resulted in the creation of a new national tribunal. This was the Court of Admiralty, presided over by the king's admiral, who commanded the royal fleet. The law administered by this court was in large part the law merchant—a term used in the Middle Ages to include both the maritime and commercial law of modern times. It has been pointed out that during the thirteenth century, when Italian merchants and bankers were developing the commerce of all Northern Europe, including England, the common law courts, by their reluctance to undertake to do justice in cases involving foreigners, and especially foreign transactions, missed the opportunity of bringing this rapidly growing field within the system of the common law. Like the clergy, the merchants constituted a class quite distinct from the ordinary members of the community. The merchant was usually a foreigner, without land or a settled place of abode. His occupation was one with which the common law judges were largely unfamiliar. His dealings with foreign banks and foreign factories gave rise to questions of a diplomatic and international sort for which the king and his

[26] See subjects, TORT and CONTRACT.

council of state seemed to be the appropriate tribunal. Thus the merchants were left to the control of local courts set up in market towns or seaports where merchants congregated, and administering what was called the custom of the sea or the custom of merchants—bodies of law largely identical, though varying in local detail from town to town, and also largely international in character—the customary observance of this distinct section of the population. Over these local courts the king and his council exercised some supervision, not only because of the international aspects of the subject matter of their law, but also because the king usually had reason for wishing to conciliate the valuable friendship of the foreign traders, and his revenue profited by the customs duties on their business. A special development of the maritime side of this law merchant—that side most closely connected with the king's executive and diplomatic interests—took place when, apparently in Edward III's reign, the king's admiral was given judicial authority to enable him to deal with matters that were becoming important to a country with a growing naval power—matters of piracy and such other maritime cases as torts and offenses committed at sea, and contracts relating to masters and mariners. Once established, the jurisdiction of the admiral enlarged rapidly, and began to absorb that of the seaport towns, who had held franchises for courts administering the law merchant, and particularly the law of the sea. This law of the sea had been moulded, by mere usage, largely on the models afforded the Italian mariners

who first carried on international trade by the Roman law, modified and developed, however, to meet the new conditions of medieval commerce. Naturally the procedure of the court tended to follow civil law models. It had, moreover, the advantage of a fresh start, unhampered by the rigid rules which had grown up in the courts of common law. Like the Court of Equity, the Court of Admiralty disregarded the institution of trial by jury, and the elaborate apparatus of pleading that this had initiated.

Thus a second new system, free from the technicalities of the common law, was added to the mechanism of justice in England. The liberalizing effect of these two new courts went a long way toward enabling England to deal with the problems of the new era which opened with the discovery of America, and with the intellectual and religious unrest that accompanied the westward spread of the Revival of Learning.

CHAPTER VIII.

THE MATURITY OF THE LAW.

64. **The administration of justice by councils.**—The Wars of the Roses, following hard on the long and draining struggle of the Hundred Years' War with France, left the English people exhausted and anxious for nothing so much as peace. Even during the civil strife the courts of law had carried on their regular operations; indeed the chances the warring nobles had been running of having their estates forfeited for treason, as one or the other faction got hold of the reins of government, had led to a great increase of conveyances of these estates in trust to non-combatants. But the sanction behind the judgments and decrees of the courts was weak. It was impossible for them to enforce their orders against the powerful nobles and their retainers. The machinery of the courts, dilatory at best and rendered more inefficient by the timidity and dishonesty of the juries obtainable in the general breakdown of traditional morality characteristic of the time, added to the dissatisfaction of the nation with the justice of the courts. England was ready to welcome a strong government, even though it should be an arbitrary and despotic one; and such a government the Tudors, so soon as they were safe on the throne, proceeded to inaugurate. They secured it by reorganizing the king's council, the original source not only

of administration but of judicature, into a close group of officials selected by the king as his advisers because of their personal loyalty to him and their administrative abilities as his officers. This council laid hold on many of the judicial duties, especially in cases of public wrongs, which the courts of common law had been unable to exercise effectively in the recent troublous times. So largely was this jurisdiction, which had never passed entirely out of the king's hands into those of the law courts, resumed by his council, that in this capacity the council, or a committee of its members, were soon themselves recognized as a court, the famous Star Chamber. It exercised a wide jurisdiction not only over matters of direct interest to the crown but also over litigation between private parties; indeed its historian, Hudson, states that "all offenses might be here examined and punished if the King will." Moreover, it was a court of very summary procedure. It had no jury; it could proceed on mere rumor; it subjected the accused to examination; it used torture to extort confessions. Other tribunals of a similar summary procedure exercised jurisdiction in special parts of England, as the Councils of the North and of Wales; or over special classes of litigation, as the Courts of Requests and of Wards. In fact, the administration of justice in England threatened to cease to be judicial, and to become executive; for the rapidity of action in these administrative tribunals, the simplicity of their procedure, and especially the effective sanction behind their decisions, brought the great bulk of the legal business for a

time to their doors. The courts of common law were often idle. The Year Books ceased, being succeeded only by an occasional set of reports put together by individual lawyers. With the executive tribunals monopolizing the important causes, the courts of common law were suffered to live largely because their activity was inconspicuous.

Meanwhile the legislative source of law was active, and during the greater part of the reign of Henry VIII and also of Elizabeth, Parliament met regularly and enacted many statutes. But these were really only legislative enactments of the royal will. Parliament, under the skillful manipulation of the king's ministers, especially Thomas Cromwell, was utterly servile. Fortunately this disposition made it unnecessary for the crown to dispense with it; and since acts which were really the king's were in form Acts of Parliament, the tradition of the legislative power of Parliament survived its period of servility, to grow, with the more courageous assemblies of the Stuart period, into the organ through which the national liberty was preserved.

The cruelty and despotism of the Tudors found only too ready a tool in the councils, but they consolidated the English people in their opposition to arbitrary government. From quasi-judicial institutions which imprisoned and tortured arbitrarily, judged without certain and defined rule, and without popular participation through the jury, the people began to turn to the tradition of a justice according to law. Men recalled the days when even a king was subject to the law, and when, in courts where

precedents were known and adherence to them was enforced by professional tradition, the course of justice was, if slow, still certain. The reaction began in the days of the new sense of nationality which in the closing years of Henry's reign rejected several attempts to secure in England a reception of the Roman law similar to that which was spreading it through Europe. This pride in national institutions was enhanced by the separation of the church in England from the Roman See, and by the splendid history of "the spacious times of great Elizabeth." The common law, with its adherence to custom and precedent, its trial by a jury of the countryside, its insistence on the superiority of law even over the monarch, seemed, in retrospect and in contrast with the Roman procedure of the administrative courts and the facile aid they lent to arbitrary power, the most valuable of English institutions.

65. **The constitutional struggle with the Stuarts —Legal aspects.**—In the long struggle of a renascent Parliament with the tyranny of the Stuarts, weaker and less popular than the Tudors as they were also more insensible to popular feeling and tradition, the learning of the common law and the ability of its lawyers were the chief forces on the side of the people. Bracton and the Year Books were appealed to against the king's absolutism, and precedent against the arbitrary powers of the executive tribunals. The courts of common law made headway against those which were offshoots of the Council, and the triumph of the Parliament in 1640 was marked by the abolition of the Court of Star Cham-

ber and most of the subsidiary tribunals of similar powers. The Court of Admiralty lost a great part of its jurisdiction, and only the Court of Chancery survived with practically undiminished prestige.

The victory of Parliamentary government and of the common law was none the less thoroughly achieved because of the Restoration of the Stuarts in 1660. The Habeas Corpus Act of 1679 entrusted to the judges of the common law the protection of individual liberty against arbitrary imprisonment on charge of crime, and the statutory activity throughout Charles II's reign shows in what complete accord the two great institutions of Parliament and the courts were working. The Bill of Rights (1689) and the Act of Settlement (1701), embodying in definite formulas the results of the long struggle between crown and people, provide alike for the liberty of the individual and of the nation from the arbitrary exercise of the executive power; insuring as they do the freedom and power of Parliament, and the independence of the judiciary not only from the control of the crown over the appointment of judges, but also from the competition of royal commissioners and courts of like nature in the administration of law.

66. **The standardizing of equity.**—The Court of Equity, as has been said, resisted all attempts at destruction or absorption. It survived alike the opposition of Henry VIII and the even more powerful and long-continued attacks of the courts of common law in Stuart times. In 1535 Henry, by the Statute of Uses, sought to destroy its most important field

of activity, the enforcement of the use or trust, but without any real success. The jealousy of the common lawyers did succeed in confining the enforcement of chancery decrees to compulsion to be exercised on the person of the defendant. In a later and more vigorous clash equity was successful. The common lawyers denied the power of equity to prevent a successful plaintiff in a court of law from having his judgment enforced if in the opinion of the Court of Equity it was shown to have been wrongfully obtained. The King, James I, gave decision in favor of the contention of equity.

But the contention between the courts of common law and equity was mitigated by the practice which grew up after the Reformation of appointing laymen, and eventually lawyers, as Lord Chancellors. These men were less daring in the exercise of their unaided discretion in determining what constituted behavior conforming to good conscience than the earlier clerical chancellors, who settled cases by appeals to Scripture or the law of reason, with somewhat arbitrary disregard of the rules furnished by the judicial experience of their brethren of the common law. The lay chancellors, and especially those familiar with the common law, developed the practice embodied in the maxim, "Equity follows the law." Thus the rules governing trust estates were worked out in close analogy with those of common law estates; and in general the chancellor sought merely to extend rather than to run counter to the legal rules he found in the common law, modifying them only where justice in the circumstances of a

particular case demanded modification. Moreover, these chancellors were willing to guide themselves, at least in general, by the precedents established by earlier decisions in equity—their own and also those of their predecessors. When in time these precedents began to be collected and published, equity reports took their place with common law reports as authorities on the law administered in their respective jurisdictions. Equity had ceased to be a system of arbitrary and irregular interference with the ordinary course of administering justice according to law, and had itself become a part of that system, coördinate with the common law and supplementing the latter at many points, though at some running counter to it. It had introduced into the conception of law a moral aspect of the legal problem which had come to be neglected in the older idea of the law as the provision of remedies—the new element of the enforcement of duties.

67. **Slow growth of private law doctrine to nineteenth century.**—The constructive energies of the legal profession seem to have been largely taken up with the constitutional and jurisdictional struggles of this period. The services of the law to the nation confirmed its practitioners in their belief that it was, as Coke had named it, "the perfection of reason." Such development of legal doctrine as occurred was smuggled into the perfect system under the cover of fictions which enabled men to avail themselves of simpler and speedier forms of action than those which fitted the actual state of facts. Fictions were also employed to oust the rival Court of Admiralty

from much of its jurisdiction. Thus, admiralty having been given control of wrongs committed in foreign ports and on the high seas, it was assumed by the courts of common law, in order to obtain jurisdiction of these wrongs, that the Mediterranean island of Minorca, for example, was at London in the parish of St. Mary-le-Bone.

Form for its own sake came to assume a ritual importance, and the lawyers reveled in the technicalities of procedure as giving to the law the dignity of a fine art. An attitude of antagonism even to statutory change in the established order began to characterize the courts in the interpretation of legislation; and besides, this advance along legislative lines seemed to be cut off by the increasing inactivity of Parliament in the eighteenth century. Such statutes as were passed were verbose and unwieldy through the effort to provide for all contingencies in sufficient detail to enable the acts to pass the ordeal of the unfriendly scrutiny of the courts. For a long time equity was almost the only active source of legal doctrine, and a very important source indeed; but the doctrine of the binding force of its own precedents had made equity a rather rigid and more or less complete system. Within a few years after the end of the eighteenth century Lord Eldon laid it down that "the doctrines of the court of equity ought to be as well settled and made as uniform as those of the common law, laying down fixed principles but taking care that they are to be applied according to the circumstances of each case."[27]

[27] Gee v. Pritchard, 2 Swanst. 402 (Eng.).

The refinements of common law pleading and practice were now matched by those of equity, and chancery became a byword not only for delay but for the cost of litigation in it.[28]

68. **The inclusion of the law merchant within the common law.**—And yet the common law was not entirely incapable, at least in the hands of a strong judge, of further development. The most conspicuous instance of this capacity was the absorption of the administration of the law merchant into the general body of the common law. As we have seen, the mercantile law had originally been a body of special customs administered for a special class in local courts, but the rise of the court of admiralty divided maritime mercantile law from the law of merchants trading within the country. Admiralty administered the custom of the sea, but the internal trade of the country was in general governed by the common law, whose courts administered justice in mercantile as in other transactions, aided by some rules borrowed from the law merchant and some statutory law which made, as in the case of bankruptcy, a distinction between traders and non-traders. As to foreign trade, the separate law merchant remained in control, though the courts of common law and equity had largely supplanted the jurisdiction of admiralty to administer it.

But the courts of common law were at first inadequately equipped to deal with these cases. They recognized mercantile law as different from the common law—as binding only on traders, as consisting

[28] See subject, EQUITY.

of a body of customs to be proved as facts. The chancellor, indeed, in cases coming before him, we are told, referred the cause for determination to a commission of merchants. To Lord Mansfield most of all was due the reduction of this law to established principles. Widely learned in the civil law, he was also familiar not only with the commercial law of Rome but with its developments in Italy, France, and Holland. From these as well as from the custom of merchants, he formulated definite and general legal principles to decide cases involving commercial transactions and thus established precedents of general law binding on all, whether merchants or not. The law merchant, ceasing to be the law of a particular class, to be substituted in their case for the ordinary rules of the common law, became itself a part of the common law, subject to development or alteration by the means through which all common law grows and changes. The doctrines thus incorporated into the law constitute the principal parts of the subjects of Insurance and Negotiable Instruments. It may be mentioned here that Mansfield is also to be remembered for the enlargement of the common law by the doctrine of quasi-contract.

69. **Legislative reform.**—It was only a Mansfield, however, who could drive a way through the tangle of obsolete precedent, the confusion of multiplied courts with conflicting jurisdictions, and the selfish conservatism of the practitioners who defended the worst of the system equally with the best because it was established. The development of the law necessary to deal with the tremendous problems of the

new industrial and commercial England was no longer to be hoped for from the courts. A thoroughgoing reconstruction was needed. In this situation it would have been natural to turn to Parliament, for legislation is the source of law which is best adapted to clear the field by root-and-branch eradication of old legal rules. But an entirely unrepresentative Parliament, and the stubborn, even reactionary conservatism into which the French Revolution and the Napoleonic wars had frightened Englishmen—lawyers, landowners, manufacturers, and merchants alike—held back the reform a quarter of a century. But the way was being prepared by the ability and devotion of Jeremy Bentham (1748-1832), who for over fifty years with unwearying zeal waged war on the legal system as he found it. To him it was, in his own words, "a fathomless and boundless chaos, made up of fiction, tautology, technicality, and inconsistency; and the administrative part of it a system of exquisitely contrived chicanery which maximizes delay and denial of justice."

Bentham was an extremist, but he was a man of extraordinary intellectual endowment; and his work of criticism, especially of the criminal law and of the rules of evidence and procedure generally, was marvelously well done. Himself a firm believer in the possibility of reform through legislation, he taught as one of his cardinal doctrines that legislation is the ideal form of law. He founded by his writings and teaching a school of legislation; his disciples gradually achieved positions of influence in Parliament; and when the cause of reform in representa-

tion triumphed in 1832 the cause of legal reform triumphed with it. Even before that time the brutal harshness of the criminal law and its administration had been much mitigated, especially by the work of one of the noblest figures in English legal history, Sir Samuel Romilly (1757-1818).

From 1832 on, legislation was active in very many fields of law, and the recommendations of successive Parliamentary commissions, composed of able and in general progressive lawyers and judges, were enacted into statutes which simplified and modernized much of the common law, especially the law of real property and conveyancing, and the law of procedure. By successive advances the jurisdictional confusion, caused in large part by a multiplicity of courts, was conquered, and at last the great Judicature Acts of 1873 and 1875 completed the work of simplification by merging the courts which still remained in one single Supreme Court of Judicature, with all the powers of both a court of law and a court of equity. Legislation still continues to be the most active source of law, and much attention has been given to improving its methods and forms. Special branches of the law, particularly in commercial law, have been codified with good results. Of late years the social legislation in England has been noteworthy not only for its amount and range but also for the introduction into it of principles, especially of responsibility and liability, widely at variance with the general tendency of the legislation and of the common law itself during the past century. A rec-

ognition both by Parliament and by the courts of the protection of social interests as the paramount object of the law seems portended by these recent developments, which have also their parallels in America. Social justice bids fair to replace a purely individualistic conception of the justice the regular administration of which it is the supreme end of the law to secure.

CHAPTER IX.

THE AMERICAN DEVELOPMENT OF THE COMMON LAW.

70. **The adoption of the common law—The colonial period.**[30]—America inherited from the mother country a developed legal system. The Judicial Committee of the Privy Council, who, under the British system of colonial government prevailing in the seventeenth and eighteenth centuries, had control of the American colonies, had in 1722 laid it down as a rule of English law "that if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go they carry that law with them, and hence such new-found country is to be governed by the laws of England; though after such country is inhabited by the English, acts of Parliament made in England without naming the foreign plantations will not bind them." This ruling, which was indeed only a practical application of a generally recognized principle of international law, states clearly the prevailing doctrine as to the relation of the American to the English common law.

Even before this doctrine had been thus definitely enunciated, the charters under which the colonists were living were all based on the common law, and

[30] See Richard C. Dale, The Adoption of the Common Law by the American Colonies, 21 American Law Register, 554-574.

in general recognized its sway in the new land. But the Puritan colonists of the North, with unpleasant memories of courts cruel to them and often sycophantic to their oppressors, at first repudiated the law of England administered in the courts of law, and especially in the court of chancery, and avowed themselves to be governed only by the law of God, as revealed in the Bible. But so thoroughly imbued were both people and magistrates with the common law ideas, and so exclusively accustomed to the common law institutions, that the actual result in practice was not easily distinguishable from a regime of common law.

Again, the Judicial Committee of the Privy Council was given the power to act as a court of appeal from the courts set up in the colonies under their charters, and also to veto the enactments of colonial legislation. Through this revisory jurisdiction not only was the law of the colonies kept in substantial conformity with that of the mother country, but a general uniformity was preserved between the laws of the various colonies themselves. The Americans early disclosed the legal bent which has been frequently noted by students of the national mind. The colonial bar boasted some able and learned lawyers. But the literature of the law was, of course, exclusively English, and the law reports, and even more the widely studied commentaries of Blackstone, gave a thoroughly English content to the law of the pre-Revolutionary period.

71. **The Revolution and the common law.**—In the contest with the mother country which culminated

in the Revolution, the colonies, even those which, like Connecticut, had pretty consistently disclaimed the common law, found it to their interest to insist on the common law as the right of Americans. The First Continental Congress in its Declaration and Resolves declared "that the respective colonies are entitled to the common law of England, and to the benefit of such of the English statutes as existed at the time of the colonization, and which they have by experience respectively found to be applicable to their several local and other circumstances."

72. **The effect of the Revolution—The reaffirming of the common law.**—Independence of the British sovereignty did not change the legal system of the United States. This was not merely because of a principle of the law of nations that the law of a country is unchanged by a mere change of political sovereignty, but also because the Americans insisted that their revolution had in part been fought to secure the rights to which the common law entitled them. Many states proceeded to provide by statute that the common law of England should be the basis of their law. Thus, for example, Virginia: "The common law of England, so far as it is not repugnant to the principles of the Constitution of this state, shall continue in force within the same, and the right and benefit of all writs, remedial and judicial, given by any Statute or Act of Parliament made in aid of the common law prior to the fourth year of the reign of James I, of a general nature and not local to England, shall still be preserved so far as the same may consist with the Constitution of this

state."[31] Even in the absence of express legislation the same doctrine was assumed by the state courts in practice; and the nation, in providing a government for its national territory by the Northwest Ordinance, granted to its inhabitants "the benefits of the writ of habeas corpus, and trial by jury, and of judicial proceedings according to the course of the common law."

73. **The new states.**—The same assumption of the adoption of the common law was applied also in the case of newly acquired territory which had been unoccupied hitherto by civilized men. Judge Field, in the case of Norris v. Harris,[32] laid down the rule that when American citizens emigrated into such territory they were "considered as carrying with them so much of the same common law in its modified and improved condition under the influence of modern civilization and republican principles as is suited to their wants and conditions."

In the case, however, of states in which a government already existed at the time of their becoming a part of the United States, the law then in force remained until abrogated by statute. Thus, Florida and Texas adopted the common law by statute, but Louisiana retained the French law of her earlier allegiance. Michigan abolished the French, and Missouri the Spanish law, which at one time were in force within their respective territories, before they were admitted as states, and adopted the common law.

[31] Pollard's Va. Code (1904), chap. 2, § 2.
[32] 15 Cal. 226.

74. **The demand for a native law.**—But while the wiser statesmen and the legal profession of the day wished to preserve the common law, the anti-British feeling in the community, which persisted after the Revolution and was aggravated by the War of 1812, called for a new and native law. In 1799 New Jersey forbade the citation in court of any decisions of the English courts since the Declaration of Independence, and other states followed suit. This attitude, however, was only temporary, and the persuasive influence of English cases as precedents re-asserted itself. The only important result of the demand for an American law was that it led to an early and important enlargement of the field of study which American lawyers sought to cultivate. Perhaps an even greater impulse in this direction was given by the French sympathies of many of the leaders of the American thought of that day. A study of the civil law, especially as expounded by the great French jurists and political theorists, was a part of the preparation of serious students for the bar, and the influence and teaching of James Wilson, trained in the civil law in Scotland, were important in the same direction. This enlargement of the outlook of the American bar resulted in an early liberalizing of the doctrine of American commercial and maritime law, and in a tendency toward a recognition of the influence of juristic writing as a persuasive source of law which not only has produced much and valuable legal literature in this country, but has also constituted a unifying element in preserving a common tradition in the large number of separate

jurisdictions now administering law in the United States.

75. **The content of the adopted law.**—While it is clear that the American people adopted the common law in general, yet the adoption by statute or judicial decision was always expressly subject to limitation. The classic statement by Justice Story puts it thus: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their condition."[33] This raises several somewhat difficult questions. What was the content of the law adopted from England? What were the conditions which rendered a particular portion of the English law inapplicable in America? How far was the English law modified by the usages of the colonial courts?

In the first place it is generally agreed that the law received included the fundamental principles of the common law, and its characteristic method of development by judicial decision.[34] It has never been seriously disputed by the bar of this country, nor by the bench so far as it has been drawn from the ranks of the legal profession, that the doctrine of adherence to precedent and of development of the law by judicial reasoning in analogy to the general principles established in precedent, obtains in America.

[33] Van Ness v. Pacard, 2 Peters 137, at 143-144 (U. S.).
[34] See Morgan v. King, 30 Barb. 9 (N. Y.), at 12-15.

As to the extent to which the particular rules of the common law were adopted, two limitations have been set. In the first place, it has been recognized as within the province of the courts to decide whether or not a given principle of the common law is applicable in American conditions. Thus, in the case of Morgan v. King, already cited, a distinction was suggested between the test of navigability in a country like England, whose rivers are relatively short and flow into the sea—i. e., that those only are navigable in which the tide ebbs and flows—and the test appropriate to our long and full-fed interior rivers. So also the English rule that the owner of cattle must keep them fenced has given way on our Western prairies to a rule better suited to these great plains.[35] In the second place, even when conditions are not such as to render an English common law rule inapplicable, a distinction is drawn between those English precedents and statutes which are binding on American courts, and those which in the case of precedents have persuasive authority only and in the case of statutes, none. State statutes, in most cases, fix a point of time after which this situation arises. This point is fixed by most of the original states at the date of their own settlement. The majority of those carved out of the Northwest Territory selected 1607, the year of the founding of Jamestown, Va. Some chose 1776, the date of the national independence. In some Western states the date set by the statute is qualified by the position that their adoption of the common law does not re-

[35] Seeley v. Peters, 5 Gilman 130, at 150 (Ill.).

quire adherence to the rules formulated by English decisions prior to that date if a later English or American decision seems to the local court to set forth a principle more consonant with the general scheme of the common law.[36] As to English statutes, the date fixed either by the adopting act of the state, or by judicial construction where no date is set, is usually the date of colonization. Some later statutes, if made applicable to the colonies and treated there as such prior to the Revolution, are also deemed to be adopted.[37]

It has been debated whether the common law system included the rules of English chancery, ecclesiastical, and administrative courts; but the law is well settled that so far as the rules of these courts are applicable to American conditions they constitute a part of the English common law in the broad use of the term. They had become before the separation from England a part of the general law of the realm, and as such of the law to which the American people laid claim. This same recognition was extended to the law merchant, so far as it had become a part of the English common law, and was of a general nature applicable to American conditions.

American law, then, is fundamentally one with the common law of England, both in content and in method of development.

76. **The courts of law.**—The administration of law in America by a trained profession is largely post-Revolutionary. In the colonies the legislatures

[36] Williams v. Miles, 68 Nebr. 463, 94 N. W. 705.

[37] Commonwealth v. Knowlton, 2 Mass. 530; and Commonwealth v. Churchill, 2 Mete. 118 (Mass.).

were themselves courts and exercised a wide range of jurisdiction. The legislature of Massachusetts is still called the General Court. The bench was largely made up of laymen, and the pioneer conditions which existed west of the Atlantic coastline made a lay administration of justice for a long time a necessity over most of the American territory. The adoption of the content and principles of development of the common law of England by the new republic did not, of course, carry with it the organization of the machinery through which the law was administered. That is a matter entirely of statutory and constitutional provision. But the experience of England was obviously drawn upon by constitution-makers and legislatures in constructing the scheme of the judicial establishments both state and federal. Fortunately the multiplicity of courts so markedly characteristic of the English system at the time when the American was being organized arose in great part from special local and historical conditions which did not prevail in America. In general, however, the provision of a local lay magistracy with jurisdiction of petty causes was modeled on the English magistracy. Next were provided a court of common law jurisdiction, civil and criminal, patterned after the King's Bench, and a court of equity like the English chancery. In the organization of courts of probate and appellate tribunals more independence was shown. The confusion of jurisdiction in England between the courts of common law, the court of chancery, and the ecclesiastical courts, in the case of problems relating to the

estates of decedents, was avoided by the establishment of separate courts of probate, with jurisdiction over both wills and the estates of intestates. In many Western states, however, probate jurisdiction is vested in the courts of general jurisdiction.

The need of a new appellate court was emphasized especially in the federal organization by the scheme of government itself, and the doctrine of separation of powers forbade the imitation of the English model, which put ultimate jurisdiction in the House of Lords. The Supreme Court of the United States furnished the model for the appellate tribunal of most of the states, though some combined the function of acting as a supreme court of review with the legislative duties of governor and council or the legislative duties of the state senate.

Although the authority of the English equity system was admitted prior to the Revolution, and its rules were to some extent applied in the colonial tribunals, the attitude of the colonies to the courts administering equity was in general adverse. This was, in part, due to a traditional jealousy of a court which in the early Stuart days had been the ready instrument of arbitrary royal power, and in part, perhaps, to the fact that the colonists were in general not only unfamiliar with the system which had developed in England after their migration, but also without particular need of its most important doctrine, which had to do with property relations unusual in the relatively simple social conditions of colonial life. Hence in some states, after the Revolution, notably Massachusetts and Pennsylvania,

general chancery courts were not established for a long time; and in many the more or less restricted equitable jurisdiction created by statute was administered by the same tribunal as administered the rules of common law. This, indeed, the typical organization in the federal jurisdiction, is usual in the older states. In only a few states was a separate court established to administer equity.

The abolition of the separate tribunals was followed by the fusion of the administration of the two systems under what is usually called the reformed procedure, which abolished the distinction between actions at law and suits in equity and their form, and established instead a single form of action, to be called a civil action.

77. **American development of the common law.**— It is not within the scope of this article to trace the history of the American legal system. Its history is largely the history of the development of the legal doctrines discussed in the articles which follow. Here one can do no more than call attention to the fact that our law and our judicial system are essentially a phase of the great system of the common law. To the growth of that system American legal history has made very important contribution. It has illustrated the applicability of the law to new and widely divergent conditions. Its separate jurisdictions, increasing from thirteen to more than fifty, have been experiment stations for the testing of new rules, judicial and legislative. Under the influence of the legislative reform movement of the

nineteenth century it inaugurated the largest experiment in codification yet attempted in English-speaking countries. It anticipated England in the fusion in many states of the administration of equity and the common law. It has developed, to a very high degree, a theory and method of legal education. Here as in England social legislation has been a feature in recent years of the program of statute-makers, and, partly as a result of the changed economic and social conditions of today, a growing tendency is being exhibited to break away from the individualistic theories of our constitutions and of the judicial and legislative thinking of the nineteenth century.

The wide differences, political, social, and economic, which divided the America of a century and a half ago from the mother country explain, in great part, the divergencies now existing between the common law of any of our jurisdictions and the common law of England at the present time. But these divergencies are relatively unimportant compared with the basic similarity which entitles us to speak of the Anglo-American legal system. The rapid disappearance of pioneer conditions with the settlement of our public domain, the development of our industries and commerce on a scale which surpasses in some respects and in others rivals the economic development of England, are elements which tend to bring together again at least the problems, if not the solutions, of our laws. The American student of law can afford to neglect neither the past nor the present of English law.

MATERIALS AND METHODS IN THE STUDY OF LAW

CHAPTER X.

THE USE OF STATUTES, REPORTS, AND SEARCH-BOOKS.

78. **Aims in the study of law.**—The student of law must keep before him in his efforts a two-fold aim. He must acquire both a knowledge of the rules and principles which compose the content of the legal system he seeks to master, and also the power of legal reasoning that makes it possible to use and apply these rules in advising his clients and presenting his contentions before a court. Indeed it may fairly be said that mastery of the law is a matter of acquiring a method of thinking even more than of storing the mind with an accumulation of legal rules. As has been pointed out,[39] the foundation principles of our Anglo-American legal system are essentially the product of judicial experience and reasoning. It is built up by the slow but safe and steady process of deciding actual cases according to general principles—a process in which the trained reason of professional administrators of justice has

[39] See §§ 8-10, 17.

been brought to bear upon concrete situations with the purpose of bringing these particular facts within some principle of justice. The task of the student of law is, therefore, primarily to familiarize himself with the methods of thought of the jurists whose ideals, reasoning, and experience have built up the structure of our law; to make these methods natural to him so that he moves comprehendingly and easily through its characteristic reasonings. No man is a master of the common law, no matter how vast and encyclopedic his acquaintance with its detailed rules, unless those processes of reasoning characteristic of what is called the legal mind have become habitual with him.

79. **Material for study—Books of primary and secondary authority.**—Law, as the great teacher, Professor Langdell, has remarked, is a science the terms and materials of which are found in books. This material of the common law is conveniently divided into two classes—books of primary and books of secondary authority. The law in the Anglo-American system is found in three forms, legislation, reports of litigated cases, and a few legal classics known as books of authority. These three literary sources furnish the only authentic evidence of what the law is, and are the primary authorities with which the student must deal. But dealing with these authorities is often a difficult matter. In the first place, they have not been written at all with the student in view. They are not arranged with a view to setting forth in a logical order the rules and principles he is seeking. They employ a highly

technical and unfamiliar vocabulary and style. In the second place, they are enormous in bulk, running into thousands of volumes, and growing in number almost daily. For these reasons there has come into being a great mass of secondary literature. This is of two distinguishable sorts, being designed either to expound the law or to render it accessible to one searching the primary authorities for law on a particular point: on the one hand, institutes, treatises, text-books, and commentaries; on the other, digests, citators, and similar search-books.

80. **Lines of study.**—The aims the student has in view and the material with which he has to work dictate the lines along which his study must be directed. In acquiring the power of legal reasoning nothing can take the place of first-hand acquaintance with and analysis of the primary authorities. But as aids in this analysis and as helps of practical convenience in acquiring a knowledge of legal rules, the student may well pursue the study of the comment and discussion he will find in treatises and text-books. Finally, the enormous multiplication of the authorities and consequently the increasing difficulty in determining how far the law has been formulated upon a given point, make it highly desirable that a student should acquire such familiarity with the books which are the apparatus of his profession that he can use them intelligently and quickly, and knows where and how to find the information he needs.

81. **Enacted law—Kinds and characteristics—Relation to case law.**—Enacted law consists, in the

main, of three distinct types: constitutions, statutes, and ordinances. These differ in the manner of their enactment and the source and extent of their authority. They are properly recognized as belonging to the one genus legislation because they are all explicit declarations by competent legislative authority of rules which the courts must observe in the administration of justice. Moreover, these rules are, so far as the skill of the enacting body can produce the desired result, explicitly and directly stated, in brief, clear, and accessible form, as abstract propositions of law. Hence, the chances of uncertainty as to what the rule intended is, are slight compared with those involved in the derivation of a rule from decided cases. Yet even statutes raise difficult problems of interpretation, so difficult as to call for special treatment.

82. **Reports—Nature.**—From the point of view of the student the most important primary authorities for law are the reports of decided cases. A report is in essence the recorded opinion of a court delivered in explanation of its decision of a case, and supplemented by such further information as will help in understanding the opinion. Not every lawsuit results in a reported decision. Indeed the vast majority of suits do not. Most suits never come to a trial at all. The defendant usually has no defense and lets a judgment be taken against him by default; often also the plaintiff withdraws a suit, having succeeded in getting a satisfactory settlement or having given up hope either of winning the suit or of get-

ting anything out of his judgment. Again, if a trial is had it is quite likely that the decision depends on the determination of matters of fact in dispute, and when this dispute is settled the law which the trial judge is called on to apply is admitted or clear. If, however, the decision by the trial judge on the points of law involved is unsatisfactory to either party, provisions are made for its review in a higher appellate tribunal where a bench of judges, after hearing argument on the points of law and after deliberation and consultation, reach a decision on principle, which it is their practice to embody in an opinion read in court. This opinion, together with whatever explanatory matter from the record of the case is useful in making the decision clear, is what constitutes the report.

83. **Reports—Official and unofficial.**—So useful to the profession are these reports as primary authorities as to the law that, in the form either of rough notes such as are found in the Year Books or of more systematic accounts of the cases by individual lawyers or specially trained reporters, a series but little broken records the decisions deemed to be important in England and America from the time of Edward I to the present.

In England this work has been continuously the work of private enterprise, although since 1865 a quasi-official association representative of the organized legal profession have published the series known as The Law Reports, and thus given them a special authority. In America from an early time the federal and various state governments have established

official reports of the decisions of at least the court of last resort in the respective jurisdictions, and these are published periodically in book form for each jurisdiction. Formerly these series were cited by the reporter's name, as Gilman's Reports (Illinois); now they are cited by the name of the state, as Illinois Reports. A case is cited by giving the name of the case, the volume before and the page after the name of the report, e. g., Pierson v. Lane 60 Iowa 60.

Unofficial series are also published, some containing all the decisions of the courts of last resort of either a single jurisdiction or a group of jurisdictions, and others containing cases selected as of importance, and annotated. Thus, the National Reporter System has combined the reports of several states in a number of reporters which are called respectively Northeastern (N. E.); Northwestern (N. W.); Southeastern (S. E.); Southwestern (S. W.); Southern (So.); Atlantic (Atl.); Pacific (Pac.); Supreme Court (Sup. Ct.); New York Supplement (N. Y. Supp.); and Federal (Fed.) Reporters. Usually these reports are designated by the abbreviations given in the parentheses. Other systems such as the Lawyer's Reports Annotated, abbreviated L. R. A. and L. R. A. (N. S.), the new series, contain only what are deemed important and leading cases of the various jurisdictions.

Some of the reports, especially the state official reports and the National Reporter System, are issued in advance sheets from week to week, which offer the latest opinions on adjudicated cases.

Thus one is enabled to read the decisions of the courts almost as soon as they are rendered.

84. **Reports—Value—Decision and dicta.**[41]—To the lawyer the report is valuable because it embodies a precedent, that is, a general rule applicable to all cases similar in their essential features to the one reported. But this rule is not necessarily found in the words of the report. It is in the reasoning which brought the court to its decision of the case. This is called the *ratio decidendi* (reason for deciding) or doctrine of the case. The opinion which constitutes the main element in the report may or may not formulate this governing principle in words. It usually attempts to do so, and often with much success. But on the other hand the principle may be left implicit, or the language in which the court tries to frame it may be too broad or otherwise inaccurate. It is not what the court says in deciding the case, but the rule by which it actually decides it, which is the precedent.

An opinion is likely to contain much more than this. In explaining or justifying its decision the court will be almost sure to use arguments, illustrations, analogies, and discussions of hypothetical cases differing in some particular from the one before it; and in such discussion it may express many opinions illuminating the principle by which it decides the case but not essential to the decision itself. Such a part of the opinion is said to be spoken by

[41] For full treatment of the subjects discussed in this and succeeding sections see an especially useful book by Professor E. Wambaugh, "The Study of Cases."

the way (obiter dictum), and is generally called a dictum. Since these dicta are not part of the doctrine of the case they are not of binding authority, but as they are the utterances of men of learning and ability they have the persuasive value of such expert opinion, especially if it can be shown that they were carefully considered by their authors.

Dicta, in the strict sense of statements made by the way in the exposition of the *ratio decidendi* (grounds of decision) may be distinguished from the use, in stating this governing principle itself, of language either too broad or too narrow for the issues presented for decision. Here the real principle can be found only by construing the language of the opinion in the light of the special facts of the case under discussion, and in the light of other decisions making clear the exact limits of the doctrine enunciated.

It remains to be observed that though the court may not formulate the principle which dictated its decision, yet the rule for which the case stands must be one which was in the mind of the court. If the principle which might well have formed the basis of the decision was not raised or even thought of by the court, but the case was decided on entirely different grounds, then the case is not a precedent for that principle; for the theory of the binding character of precedent rests upon the fact that the decision according to a general rule has been the result of deliberation upon the rule.

85. **The study of reported cases.**—The determination of the doctrine for which a case is an authority,

and the determination of the value of that authority in its application to a particular legal problem, are the chief tasks which engage the student of the common law. This study may well begin with an analysis of the elements of the report, all of which are of importance both in arriving at the doctrine of law for which the case stands and in estimating its value as an authority. A report normally contains five parts: the title of the case, including the names of the parties, the court, and the date of the decision; the syllabus or headnote, a brief abstract by the reporter of the proposition of law for which he considers the case to stand; the statement of the case, another brief statement by the reporter of such matters of fact and procedure as are necessary to show what questions of law are involved in the case; the opinion, or, sometimes, opinions if the court is not unanimous; and finally a brief note of the disposition made of the case by the court. To these parts a sixth is sometimes added—namely, a brief summary of the arguments of counsel and citation of their authorities. The student will find it helpful to make his own summary of the case, paying particular attention to these cardinal points: who were the parties plaintiff and defendant; how did the case come before the present court; what were the essential facts in the case; what precisely was the question or questions of law which the court was called on to answer; how did they answer them; what reasons did they give for their answer?

86. **Comparison of cases.**—In general the study of the case aims at stripping away the non-essential

elements in the particular case and arriving, largely by a process of abstraction, at the rule which governed the decision. This can rarely be done successfully without the comparison of cases with each other. A general doctrine, particular aspects of which are involved in different cases, emerges only when these cases are brought together, compared, and combined. One must hold one's judgment in suspense until the study of a sufficient number of allied decisions makes clear the limits of the essential doctrine of them all. Thus if we find A held liable for an injury to B caused by B's falling over a barrow which C, employed by A as a gardener, had carelessly left on the street over night, we might conclude that an employer was liable for the negligent tort of his employe. But when we find from another case that A is not liable for the negligence of a builder whom he has employed to build a house for him and who has carelessly left his trestles on the street, we may re-formulate the rule to run: if the employe is a servant and not an independent contractor the employer-master will be liable for his negligent tort. Even then we should find the rule needed qualification. For instance, if A's gardener injured B by running him down with A's automobile which he had undertaken to operate at the request of A's chauffeur, A would not be liable. The rule might now appear: a master is liable for the negligent torts of his servant while the servant is engaged in the employment for which the master hired him. The doctrine might be still further pursued, but perhaps enough has been said to show that the

process of eliminating non-essentials to arrive at an accurate statement of a rule of law is often a matter which requires a patient comparison of allied cases.

87. **Books of authority.**—While statutes and reports are the chief forms in which the law is to be found, some treatises of long-tested value have an authority for the law of their period akin to that of statutes or decided cases. They may be cited and relied on as accurately stating the law in cases where judicial authority is not available. Of these the most noteworthy are: Glanvil's Treatise on the Laws of England, written in Henry II's time; Bracton's Laws and Customs of England, written in Henry III's time; Littleton's Book of Tenures, of the time of Edward IV; and Coke's Institutes, of the time of Elizabeth and James I. Glanvil and Bracton are useful mainly in giving a picture of the early common law; Littleton, with Coke's commentary on his book, is the great authority on the law of real property in the period when its outlines largely became fixed; Coke's Institutes cover the common law of his day.

88. **Treatises and text-books.**—To the work of extracting the principles of law from the primary authorities, bringing together those on related topics, and arranging them into a logical development of some branch of the law, many able and learned men have given great time and labor. Their treatises have value not only as making the law more accessible and intelligible but also as serving by criticism and suggestion to further its development. Text-books and treatises differ widely in usefulness

and value, but good ones are indispensable aids to the student, and the considered opinions of great text writers have no inconsiderable weight with courts of law. To get the best results from the use of a text-book in study, the student should preserve toward it an attitude of friendly criticism. He should test his understanding of its abstract statements by trying to invent concrete cases for their application, and should further test the soundness of the statement, when he is sure he understands it, by inquiring whether it will give what seems a just solution of the cases he has imagined. Where the language of the text is not grasped or seems unsound, the student should refer to the cases cited in support of it, and examine them closely to see how far they bear out the rule stated. The danger of the exclusive use of text-books is that the student comes to rely on his text-book as authority, and ceases to think for himself. Such a habit is fatal to success in the legal profession.

89. **Search-books—Digests—Citators.**—The enormous accumulation of reported cases makes the task of finding the law on any given point a difficult one. It would be impossible without an elaborate and systematic indexing of the contents of the reports. The initial step in this indexing is the syllabus or headnote found at the head of each reported case. The headnote is prepared usually by the reporter, but in some jurisdictions by the judge handing down the opinion reported. Catchwords prefixed to the paragraphs of the note serve to index the various propositions, under a scheme of classification which groups

the subject-matter of the law in some logical or convenient form; and the material thus assorted is arranged alphabetically in an index-digest at the end of the volume. This material is also brought together from time to time in digests collecting in one alphabet the propositions of law from the cases decided in a state or group of states, and also in a digest which covers the whole of the United States. A system of subdivision of the field of law and an equally elaborate scheme of cross-referencing enable the digest-makers to arrange this vast mass of material in very accessible form. By use of these digests, which have now been prepared for all the leading common law jurisdictions, both American and British, it is now possible to find all the reported decisions having bearing on any proposition of law.

The best known digest system for comprehensive work is that termed the American Digest System. It consists of a "Century Digest" of all state and federal cases from 1658 to 1896, of a "Decennial Digest" of cases decided in the same jurisdictions from 1897 to 1906, of annual and semi-annual volumes of such cases, and of advance sheets delivered from month to month—enabling one, by the use of these various volumes, to locate old and current authorities on any adjudicated legal problem.

90. **Encyclopedias.**—Encyclopedias stand somewhere between search-books and digests. They may be divided into two classes—one, represented by the American and English Encyclopedia of Law, and the Cyclopedia of Law and Procedure, attempts to cover the whole field of law by an alphabetically arranged

series of articles on legal topics, stating briefly in the text the doctrines developed and furnishing full citations to the authorities in notes; the other, of which this work is typical, seeks to state concisely the fundamental principles of the various topics into which the law may be divided, without any detailed collection of authorities. The former class approximates the search-book, the latter the text-book or treatise.

91. **Text-books and citators.**—A text-book itself furnishes in its cited authorities a very useful index to the primary authorities. The subsequent references in the decisions of the same jurisdiction to any decided case, showing in what later cases it has been approved, criticised, or rejected as authority, have been collected in what are called citators, and modern volumes of reports also furnish an index of such matters for the cases they contain.

A student should familiarize himself as rapidly as possible with the more or less mechanical but highly useful art of searching authorities. This familiarity can come only by practice with the search books, which are the apparatus of his profession. But time and labor will be saved by a careful preliminary study of the plans on which these elaborate indexes are built. The same suggestion applies in the case of text-books. The first step in using any of the lawyer's tools is to acquaint oneself with its construction.

92. **Conclusion.**—Only by careful adherence to system both in his search for authority and in the arrangement of his acquisitions can the lawyer make

his knowledge available in practice. The legal mind is essentially an orderly and systematic one, apt at classifying and pigeon-holing the results of judicial thought and experiment and its supplementing by the activities of the legislature. No assiduity of practice to attain habits of system can be misspent. But system is after all only the anatomy of the law. Its life blood is reason; and patient study of the methods of thinking of its great expounders must be persisted in until the processes of legal reasoning become familiar and natural to the student. And an element of the legal mind even more fundamentally important is the constant recognition that the law is essentially a means to justice as an end. The soul of the law is justice. The task of the legal profession, practitioner as well as judge, is to seek to realize, through the mechanism of the law, that adjustment of human interests to the securing of social progress which is the constantly developing ideal of justice.

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QUIZ QUESTIONS

LAW—ITS ORIGIN, NATURE AND DEVELOPMENT

(*The numbers refer to the numbered sections in the text.*)

1. What practical advantage is served by a knowledge of legal theory?
2. Distinguish the lawyer's use of the word "law" from the scientist's; the moralist's.
3. What is the relation between law and justice?
4. Trace the steps by which the administration of justice becomes an administration according to law.
5. What are the sanctions of law?
6. What are the legally recognized sources of law? Distinguish imperative and persuasive sources.
7. In what senses is custom a source of law? Illustrate.
8. What is the doctrine of stare decisis? Compare the position of precedent in the Anglo-American and the Civil Law systems.
   Distinguish imperative and persuasive precedents. Illustrate for your own state.
9. Under what circumstances may a precedent be disregarded?
10. How do precedents arise? Is the judge's work here distinguishable at all from the legislator's (cf. § 82). Can you justify the rule of stare decisis?
11. What is the use of quoting precedents from one state in the courts of a second state? What is meant by the weight of authority in this connection?
12. What part does the opinion of lawyers play in moulding the law?

13. Compare the authority given to juristic writing in the Civil Law and in Anglo-American law. In your opinion, which position is preferable?
14. How far can legal and moral rules coincide? Explain.
15. What are the advantages of legislative law-making? Can you think of any countervailing disadvantages?
16-17. What are the proper functions of the courts in dealing with legislation?
18. What is a code? What are the advantages and disadvantages of codification?
19. How are human interests related to law?
20-22. Classify as individual, public, and social, the chief interests with which the law is concerned.
23. Why must the law balance interests? On what principle?
24. How does the law secure interests? Explain and illustrate what is meant by *duty, right, power, liberty.*
25. A gives B a promissory note promising to pay him $100. Analyze the rights and duties involved, into their elements.
26. Define and illustrate *right in rem, right in personam, absolute right,* and *relative right.*
27. What is the difference between a primary and a remedial right?
    Illustrate and compare the value of the various remedial rights which our legal system furnishes.
28. What is the subject-matter of adjective law?
29. Make an outline classification of the branches of Anglo-American law.
30. What are the various usages of the phrase "the common law"?
32-33. What was the conception of the purpose of law in the Anglo-Saxon period?
    What was the weakness of the Anglo-Saxon legal system and how was this affected by the Norman conquest?
34. What was the essential legal element in the feudal system?
35. Trace the steps by which the administration of justice was centered in the king's courts.
36. What other courts exercised jurisdiction in Norman days?
37. What contributions to the conception of law are attributable to this period?
38. What were the chief fields of Henry II's legal activities?

39. What were the means by which he secured resort to the royal courts?
40. What was the essential peculiarity of all the older modes of trial?
41-42. Describe the *inquest*, and Henry's use of it in civil and in criminal cases.
43. What was the king's writ? What was its legal usefulness?
44. What was the purpose and the effect of establishing judicial circuits throughout England?
45. What contribution did Magna Charta make to English law?
46. How was the law affected by its practice becoming a special profession?
47. How did the trial jury develop out of the inquest?
48. What was the historical origin of the doctrine of *stare decisis*?
49. What was the writ of trespass and what its legal importance?
50. What source of law became active in Edward I's reign and what were its principal contributions in this period to the law?
51. What jurisdiction still lay outside the courts of Common Law?
52. What were the principal changes made in the land law during Edward I's reign? Explain their importance.
53. What part did the *writ* play in the development of law in this period?
54. What differentiation took place in the law courts in this period? How did it affect the classes of litigation each could deal with?
55. What was the effect of the further professionalizing of law on the development of legal doctrine? (Cf. § 46.)
56. What influences contributed to the increasing rigidity of the legal system?
57. Why was this especially unfortunate at the time?
58. What change took place in the character of legislation after the death of Edward I?
59. Trace the development of Chancery from a department of state into a court.
60. Trace the development of its equity jurisdiction.

61. What were its procedural advantages over the courts of common law?
62. What advances in legal doctrine are due to the courts of common law during this period?
63. Trace the history of the law merchant to this period. What was the contribution of the Court of Admiralty to English law?
64. Why did the courts lose in influence and importance during the Tudor period, and what led to a reaction in their favor?
65. How did the law and the legal profession figure in the constitutional struggle with the Stuarts?
66. What changes took place in the courts of equity during this period?
67. Characterize the situation of legal doctrine during the eighteenth century.
68. Explain how the law merchant became incorporated into the common law.
69. What was the work of Jeremy Bentham? What legal reforms resulted from it?
70. How was the common law introduced into America?
71-73. What was the effect of the Revolution on the American law?
74. What liberalizing influences affected its early development?
75. What elements of the common law were adopted in America?
76. How far was the organization of the American judicial system based on English models, and how did it depart from them?
77. What contributions has America made to the system of the Common Law?
78. Why is a study of judicial reasoning particularly important to the student of the Anglo-American legal system?
79-80. What is meant by books of primary authority? Of secondary authority?
81. What is the essential characteristic of enacted law?
82. What is a report? When does a law suit result in a report?
83. Explain the following citations: Van Ness v. Packard, 2 Peters, 37 (U. S.); Commonwealth v. Knowlton, 2 Mass. 530.
84. Explain ratio decidendi; obiter dictum. What is the value

of dicta? What is the relation between the opinion and the precedent in a case?

85. Make a summary-analysis under the five heads suggested in this section of some of the illustrative cases in this volume. Try to condense the statement of facts and the reasons for the decision without omitting anything essential. If possible, compare your summary with one of the same case made by a fellow-student. Compare it also with the head-note made by the reporter.
86. Show how a comparison of cases is necessary to arrive at some particular legal doctrine—e. g., the revocation of an offer for a contract. (See subject, Contracts.)
87. What are the chief books of authority in English law?
88. What is the function of the text-book in the study of law?
89. Try to find in a national digest the case of which you made a brief under question 85.
90. Perform the same exercise with an encyclopedia.
91. Trace its subsequent history in a citator.

PART III

CONTRACTS

BY

WILLIAM CHARLES WERMUTH, M.S., LL.B.*

INTRODUCTORY TOPICS

CHAPTER I.

DEFINITION AND HISTORY OF CONTRACT.

1. **Rights and obligations.**—A right consists of the power or capacity one has to influence the action of another. It may be derived from the moral sentiment of the community, when it is called a moral right. If derived from the government and enforced by the court, it becomes a legal right. In addition to moral and legal rights, there exist physical rights, which are based on might.

Obligations are of two sorts: delictual and contractual. A delictual obligation arises from the violation of a preëxisting right. It does not depend for its creation upon any desire of or attempt by the parties concerned to create it, but arises by virtue of one's place as an individual of society. Thus, A owes B a duty not to assault him. B enjoys a preëxisting

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right from which a new right arises when the first is violated, entitling him to damages. The right of B is said to be a right in rem, that is, against the world at large. Such rights are to be found in the law of torts.

Contractual obligations arise between the parties by means of their acts. They depend on no rights that the parties have had. Thus, when A and B enter into a contract, new rights and duties are created by A and B which did not previously exist. This right is one in personam, that is, against determinate persons.

The determination of the rights and duties created by contract furnish the scope of this article.

2. **Contract defined.**—A contract is an agreement between two parties, resulting in an obligation or legal tie, by reason of which one party is entitled to have certain stipulated acts performed or forborne by the other. There are many definitions of a contract. Blackstone states that "A contract is an agreement, upon sufficient consideration, to do a particular thing."[1] In Sturges v. Crowninshield it is said that "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing."[2] A contract is also said to be an agreement enforcible at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.[3] According to the etymology of the word,

[1] 2 Blackstone, Commentaries, p. 446.
[2] Marshall, C. J., in 4 Wheat. 122 (U. S.).
[3] Anson, Contracts (English ed.), p. 9.

from contraho, a contract is a drawing together of the minds of the parties until they meet in agreement.[4]

3. **Essentials of the definition.**—There are four things which are necessary to make a contract: (1) the offer and acceptance, called the agreement; (2) the form or the consideration; (3) the parties; (4) the subject matter.[5]

Briefly, (1) the agreement, consisting of the offer and acceptance, is the assent given by each party to the other with reference to the subject matter, the parties being of the same mind and intention concerning the matter agreed upon. (2) The form is that which the law requires to give the agreement legal recognition. Thus, a deed must be under seal, and the court will not enforce it unless it is. Or, if a contract is not under seal, it must have a consideration. Consideration means a forbearance, or a detriment, or a giving up of something one is not bound to give. Thus, to make a promise one is not bound to make is a consideration for another promise.[6] Furthermore, to enforce a promise, a writing may be necessary. (3) The parties must consist of two or more persons, for no one can make a contract with himself.[7] Finally, (4) the subject matter is the thing concerning which the contract is made. It may be as varied as the necessities of human life. The only limitations on what may be the subject matter of contracts are impossible subjects and those disallowed for reasons to be mentioned.

[4] McNulty v. Prentice, 25 Barb. 204 (N. Y.).
[5] Fuller v. Kemp, 138 N. Y. 231.
[6] See Chap. III.
[7] Faulkner v. Lowe, 2 Ex. 595 (Eng.).

Suppose A promises to enter B's service for one year, and B promises to pay A $1,000 for his work. The agreement consists of the meeting of minds of A and B as to the terms of the contract. The consideration consists of the mutual promises. The parties, of course, are A and B, and the subject matter consists of the services to be rendered.

4. **Use of term "contract."**—The term "contract" is used to designate every description of agreement or obligation, whether verbal or written, with or without seal, by which one party is bound to another to perform or omit to perform a stipulated act. It denotes that one person is bound to another to do or render something, and that a duty is imposed as well as a right conferred, though "obligation," "agreement," "covenant," and "promise" are sometimes used in the same sense. In the Roman civil law, "obligation" was the term used to designate all the rights and liabilities which are termed "rights in personam," or the rights which one person has to acts or forbearances from others.

When one inquires whether it is the agreement that constitutes the contract, or the obligation resulting from the contract, at once one finds that the word "contract" is used in various senses. Sometimes it denotes the fact of agreement, and sometimes the nature of agreement. Again, it may refer to the written instrument which contains the agreement. Sometimes it denotes the obligation resulting from the agreement. The terms "void contracts" and "illegal contracts" have been adopted although there is no obligation whatever in such situations.

The contractual obligations which the common law recognized were enforced, and are still enforced, not because those obligations are the result of agreement, but because certain procedure afforded remedies for certain wrongs.

5. **Classification of contracts.**—The subject of contracts has been variously classified. With respect to form, contracts are: (1) Formal contracts; (2) Quasi-formal contracts; and (3) Simple contracts.[8]

(1) *Formal contracts.* These obligations are dependent for their validity upon their form, and may be divided into contracts of record and contracts under seal. An example of a contract of record is a judgment of a court, or a recognizance. These are not true contracts, however, for the obligation is imposed by law, and not by the agreement of the parties.

A contract under seal, also called a specialty, is a written promise or obligation which derives its validity, at common law, from its form alone, to-wit, the presence of a seal.

Thus where A executes an instrument by which he agrees to work for B for a year, and the word "Seal" appears after his signature, the contract is a specialty.

(2) *Quasi-formal.* Quasi-formal contracts are those which are partly dependent on form and partly on consideration. They are more commonly included under the term simple contracts. An example is a bill of exchange.

(3) *Simple contracts.* All other contracts are simple contracts, whether they be oral or in writing.[9]

[8] See § 6.

[9] There is no distinction as to validity, whether a contract be unwritten or in writing, unless the Statute of Frauds applies. See Chap. VI.

Other terms applied to this class are informal contracts, and parol contracts.

Thus where A orally agrees to sell B his horse for $100, the contract is simple. Similarly, if he agrees in writing to sell the horse, it is a simple contract, provided there is no seal.

6. **Same subject—Express, implied, and quasi-contracts.**—Contracts are further divided into express and implied contracts. The latter class often is made to include what are more properly termed quasi-contracts.[10]

Express contracts are so stated, either by word or in writing, that the terms and the promises are fully known to each of the contracting parties. Where A agrees to sell B a horse for $100, and B agrees to buy the horse for that sum, the terms of the contract are fully expressed.

An implied contract arises where the parties have not so fully stated the terms, but have actually made a contract. In such cases the terms of the contract are determined by the conduct of the parties and the inferences properly deducible from the attending circumstances. In short, the parties are actually contracting but not expressly and fully. This idea is important, because it distinguishes such implied contracts from another class, sometimes called implied contracts, or contracts implied in law, but in modern jurisprudence termed quasi-contracts.[11]

If A works for B under such circumstances that no reasonable man would conclude that A meant to

[10] Highway Commissioners v. Bloomington, 253 Ill. 164, LEADING ILLUSTRATIVE CASES.

[11] Harris v. Smith, 79 Mich. 54, LEADING ILLUSTRATIVE CASES.

work without compensation, B is liable to A for the fair value of such services. Although nothing was mentioned as to the amount of the salary, from B's conduct it is implied that as a matter of fact he expected to pay A. This example illustrates a contract implied in fact. There is a contract, but its expressed terms are incomplete and other terms must be implied from the fact that B employed A.[12]

But, if A, in making change, by mistake gives B ten dollars instead of five dollars, it is clearly unjust that B retain the extra five dollars. There is, however, no contract, express or implied, between A and B for the return of that money. Neither from the circumstances nor in any other way can any sort of contract be found. But now the law steps in and imposes an obligation on B to return the five dollars, for he is unjustly enriched at the expense of A. This doctrine of unjust enrichment is the fundamental basis of the subject of quasi-contracts, and illustrates the differences between that subject and contracts implied in fact.

In this text the term "implied contracts" is used to mean contracts made by the parties, but not expressed, and the term "quasi-contracts," to cover those obligations not necessarily intended by the parties, but which the law imposes.[13]

The general distinction between express and implied contracts is in the mode of proof. An express contract is proved by evidence of the words used or

[12] Fogg v. Portsmouth Athenæum, 44 N. H. 115, LEADING ILLUSTRATIVE CASES.

[13] See subject, QUASI-CONTRACTS; Highway Commissioners v. Bloomington, 253 Ill. 164, LEADING ILLUSTRATIVE CASES.

writing executed. In implied contracts the intention of the parties is determined by proving the facts and circumstances surrounding them. But when a contract is established in either of these ways, it is of the same validity and effect, and the consequences of a breach of the contract are the same.[14] There can be no implied contract where there is an express contract between the parties in reference to the same subject matter.[15] This rule only applies, however, where the two contracts relate to the same subject matter, and where the provisions of the express contract would supersede those of the other.

7. **Same subject—Executed and executory contracts.**—A contract that is fully performed by the parties is known as an executed contract.

Thus if A agrees to sell B his horse for $100, and B actually purchases and receives the horse and pays over the money, the contract has been performed and is executed. If performance is incomplete, the contract is executory.

If B in the case just given has not received the horse nor paid the purchase price, and neither side has performed, the contract is executory. Consequently, a contract which has been performed by A, but not by B, is executed as to A and executory as to B.[16]

8. **Same subject—Bilateral and unilateral contracts.**—A bilateral contract is one where there are reciprocal promises, so that there is something to be

[14] Harris v. Smith, 79 Mich. 54, LEADING ILLUSTRATIVE CASES.

[15] Walker v. Brown, 28 Ill. 378.

[16] 2 Blackstone, Commentaries, p. 443; Fletcher v. Peck, 6 Cranch 87, 136 (U. S.).

done or forborne on both sides. Such a contract consists of mutual executory promises. Thus where A promises to sell B his horse for $100, and B promises to purchase the horse for that figure, there is a bilateral contract.

A unilateral contract is one in which there is a promise on one side only. Thus where the consideration is executed on one side and executory on the other, the contract is unilateral. B promises to pay A a dollar if he will deliver a package to B. There is no obligation upon A to deliver the package, but if A delivers the package to B, he obtains the promise of B to pay the dollar. The contract is executed as to A and executory as to B. Examples of unilateral contracts are promissory notes.[17]

9. **Contracts in civil law.**—The term "commutative contract" is used in the civil law to designate a contract in which each of the contracting parties gives and receives an equivalent.[18] In Louisiana,[19] commutative contracts are declared to be "those in which what is done, given or promised by one party, is considered as equivalent to, or a consideration for, what is done, given or promised by the other."[20]

10. **Terminology.**—There are certain terms which require special attention because they are frequently used with insufficient precision and because they signify very real differences in the rights arising out of contract. These terms are: void, voidable and unenforcible.

[17] Langdell, Summary of Contracts, §§ 183-187.

[18] Burrill, Law Dictionary.

[19] Civil law state.

[20] Louisiana, Civil Code, art. 1768.

(1) *Void contracts.* Such contracts are of no legal effect whatsoever, as an agreement to commit a crime. They can create no legal rights.

(2) *Voidable contracts.* Such contracts a party may affirm or reject. In short, the contract has a flaw, but it may be enforced if the party so desires, or he may reject the contract. An example is the contract of a minor for something other than necessaries.

(3) *Unenforcible contracts.* The difference between what is voidable and what is unenforcible is mainly a difference between substance and procedure. A contract may exist, but may be incapable of proof because the Statute of Limitations, for instance, has run against it. Or, the Statute of Frauds may require the contract to be in writing, as for the sale of land. If it is not in writing, the contract may not be proved. In these cases, the contracts are neither void nor voidable, but merely unenforcible.

11. **History of contract.**—The idea of contractual obligation has not always existed in English jurisprudence. The development of the doctrines underlying the subject of contracts is interwoven with the history of procedure. Only recently has historical research indicated the progress of the steps in thought from the early law to the modern conception of contracts.

In the early English law, the trial of a law suit did not involve a judicial determination of the merits of the case upon the evidence offered by the parties. It was merely a proceeding between the parties, carried on publicly under forms which the community

oversaw.[21] The old forms of trial were not based on modern ideas of jurisprudence, and have been treated in the article on Law, Its Nature, Origin and Development.[22]

Justice in the King's Court was administered by means of the royal writ, directing the sheriff to summon the defendant to appear before the court. In modern times, the idea prevails that, if a man has a legal right, he must have a legal remedy to enforce that right. In early days, however, a man's rights in the king's courts were limited by these writs which he could get from chancery, whence the writs were issued. These were few in number, and their history and nature will be briefly discussed.

12. **Same subject—Forms of action.**—Actions *ex contractu* have been as follows:

Debt. The action of debt was brought on an ascertained or liquidated claim. At early common law it was a specific sum of money or a fixed amount of chattels due from the debtor to the creditor. To-day the term is applied only where money is due. The thing from the receipt of which a debt arose came to be termed *quid pro quo,* which was always some benefit rendered by the creditor to the debtor.

Covenant. The writ of covenant was the common-law action on a sealed instrument or specialty, and was used to enforce a covenant or promise. The rule requiring a seal to every covenant prevented the writ of covenant from becoming a general remedy for the enforcement of contracts.

[21] 5 Harvard Law Review 46.

[22] See also Bigelow, History of Procedure, p. 308.

Account. The writ of account was used to compel a factor or bailiff to account for moneys received by him on behalf of his employers. This action has been more or less modified by statute and encroached upon by the chancery courts who took jurisdiction of intricate accounts.[23]

Trespass on the case. On account of the limited number of king's writs, there were many wrongs for which no remedies existed. Consequently, a statute was passed which provided that where there was a wrong, which was not within the scope of the writs in common use, the chancery clerks might issue a writ adapted to the circumstances of the particular case. This led to the introduction of writs of trespass on the case, which gave a remedy where damage had resulted from the defendant's conduct, even if there was no forcible contact, the requisite of the writ of trespass proper. But it was necessary to allege and prove an undertaking on the part of the defendant before he could be held for negligence. From this requirement of alleging an undertaking, or *assumpsit,* the writs were known as writs of trespass on the case in assumpsit. In the course of time it came to be held that the defendant's negligence and not his undertaking was the gist of the action, so the assumpsit was finally omitted.

Special assumpsit. In actions for deceit for the breach of a parol promise, in the fifteenth century, the courts finally permitted the plaintiff to recover damages where he had parted with money or property on the strength of the defendant's promise. The

[23] Ames, 8 Harvard Law Review 253.

doctrine was later extended so that the action might be brought whenever the plaintiff had incurred any detriment by acting on the defendant's promise. The action for breach of a parol promise then came to be regarded as an action *ex contractu,* and developed into the action of special assumpsit.[24] To-day, the action of special assumpsit may be brought on any express contract.

Indebitatus assumpsit. The action of indebitatus assumpsit is brought on contracts implied in fact and on obligations imposed by law. It originated about the sixteenth century in cases where there was a debt due from defendant to the plaintiff and a promise by the defendant to pay the debt. Now, although it is usually alleged, the promise is unnecessary to maintain the action.

[24] 2 Harvard Law Review 10.

THE FORMATION OF CONTRACTS

CHAPTER II.

OFFER AND ACCEPTANCE.

13. **Agreement.**—As indicated in a prior section,[25] the essential elements of a contract are the offer and acceptance (constituting the agreement), the consideration or the seal, the parties and the subject matter. The presence of all of these elements creates a valid contract. If one is absent, there is no contract.

The term "agreement," in its most general sense, means the concurring of two minds in the same opinion or purpose. At least two parties are required to constitute an agreement. But the agreement which enters into the formation of a contract must be something more than a mere concurrence of the minds of A and B to some opinion, such as: "Clark Street runs east and west." In short, there must be a promise. A and B must also assent to a promise or to promises. When A says to B, "I will promise to work for you for three months if you will promise to pay me $15 a week for three months," and B assents, there is an agreement which may become

[25] See § 3.

an element of a contract. In short, the promise must be enforcible at law; otherwise the agreement is not an element of a contract. A joking promise, whereby A agrees to roll a peanut down the street if B promises to buy him a dinner, would not be an element of a contract, because such an agreement is not enforcible at law.[26]

14. **Nature of the agreement.**—In general, this agreement or assent of the parties must be a mutual willingness to enter upon and be bound by an understood bargain. There is no contract unless the parties so assent to the same thing and in the same sense. But this does not necessitate a union of the secret thoughts and intentions of the parties. Similarly, the motives which induce the parties to enter into a contract are as a rule not material. All that is necessary is the outward assent of both sides of the contract to the same thing and in the same general sense.[27]

This assent or agreement originates from an offer and an acceptance. A says to B, "I will sell you my horse for $50." B replies, "I accept." By this offer and acceptance there is an agreement.

15. **What is an offer.**—An offer that may be accepted and create a contract must possess certain characteristics:

First, an offer must be communicated to the offeree (the person to whom the offer is made) and from the offerer (the one who makes the offer). Necessarily, it is not possible for one to assent to something of

[26] Keller v. Holdeman, 11 Mich. 248, LEADING ILLUSTRATIVE CASES.

[27] Williams v. Carwardine, 4 B. & A. 621 (Eng.), LEADING ILLUSTRATIVE CASES.

which he is ignorant. Therefore, the offeree must be informed that an offer exists. The communication of the offer may be in whatsoever mode the offerer chooses. Thus A may offer to sell B a bushel of potatoes. That offer must be communicated to B in order that it may be acted upon. But A may make his offer either by telling it to B orally, or by posting it, or by sending it by messenger, or by telephoning or telegraphing his proposition. The variety of modes for making an offer is unlimited.

Second, the offer as communicated must be complete. If B, in answer to A's offer, must add further terms, then A's offer is not complete. Instead, B is then making the offer.[28] Thus if A offers B a bushel of potatoes for sale, without mentioning a price, and B writes back, "I take your bushel for ninety cents," B is making a new offer and is not accepting A's offer. Consequently, there is as yet no meeting of minds, for A had never agreed with B as to a price.

Third, the offer must be intended seriously. A mere joke, which no one would reasonably consider a serious offer, may not be accepted for the purposes of contract. But, even if the offer were not intended seriously, a contract may arise by estoppel.[29] Thus, if a reasonable man would be justified in treating the offer seriously, and the offeree acted on the offer to his injury, the offerer would be bound. The question

[28] Anson, Contracts (Huffcut's 2d ed.), p. 19.

[29] Where A, relying on what B has allowed to appear as the truth of a fact, acts on the appearance, and suffers damage thereby because the appearance was untrue, B is said to be estopped from denying the truth of that fact; Nyulasy v. Rowan, 17 Victorian Law Rep. 663 (Victoria).

is one of fact. Where a person whose horse was stolen exclaimed, "I will give $100 to anyone who will find out the thief," it was held not to be an offer to pay a reward, but merely an explosion of wrath against the thief.[30] Yet, had the evidence proved that the offerer intended his offer to be accepted, then there would have been a serious offer.

16. **Duration of offers—Reasonable time.**—The offerer may withdraw his offer at any time before acceptance, but he is irrevocably bound after acceptance. If there is no acceptance and no revocation, the offer is open for a reasonable length of time. The determination of what is a reasonable length of time depends upon the circumstances of the particular case. In fact, a reasonable time may vary from a few minutes in some cases to a much longer time in other situations. Furthermore, where there are many decisions involving like situations, what is a reasonable time may become a matter of law rather than a question of fact. Then it is determined by the judge and not by the jury.[31]

In the case of Minnesota Linseed Oil Co. v. Collier White Lead Co.,[32] A offered to sell B linseed oil. The offer was by wire and sent at 9:15 p. m. on Saturday night, July 31st. B received the telegram on Monday, August 2nd, between 8 and 9 a. m. He sent a telegram of acceptance on Tuesday, August 3rd, at about 9 a. m. A refused to recognize the acceptance. The court held that the offer had terminated by lapse

[30] Higgins v. Lessig, 49 Ill. App. 459.
[31] Loring v. Boston, 7 Metc. 409 (Mass.); Ferrier v. Storer, 63 Ia. 484.
[32] 4 Dill. 431 (U. S.).

of time, taking into consideration the fact that the article was at that time fluctuating rapidly in value. Twenty-four hours' delay was held to be an unreasonable delay in this case. Similarly, an offer sent by telegram but accepted by mail would not comply with the implied terms of the offer, requiring a speedy answer. The offer would have terminated.

17. **Same subject—Options.**—A contract to keep an offer open for a certain length of time is called an option. Thus, A pays B a consideration of five dollars to keep open until January 1st B's offer to sell to him his horse. A may accept B's offer at any time up to January 1st, and B may not revoke the offer before January 1st. Suppose that A makes an offer in writing, and further states that he will keep the offer open for 15 days. Instead of receiving a consideration he places a seal after his name. Most jurisdictions hold that this is a contract, and that the offer is irrevocable for the time mentioned in the writing. Other jurisdictions hold that in the absence of consideration (as one dollar) the offer may be revoked.

Care should be exercised in distinguishing between the contract to keep open the offer and the contract which is formed when that offer is accepted. When A accepts B's offer, which is held open by contract, to buy his horse, there is then a further contract for the sale of a horse.[33]

18. **Same subject—Time fixed.**—An offer terminates when the time fixed in its terms for acceptance

[33] Crandall v. Willig, 166 Ill. 233, LEADING ILLUSTRATIVE CASES; Mansfield v. Hodgdon, 147 Mass. 304.

has passed without any acceptance by the offeree. When A offers to sell B his law books if B will accept in 24 hours, the offer terminates of itself at the end of the 24 hours. Moreover, A may revoke the offer at any time before the 24 hours have passed, unless there is a contract, as an option, to keep the offer open.[34]

19. **Same subject—Death—Insanity.**—The death of either the offerer or offeree terminates the offer. This is said to be by operation of law. The rule is properly based on the theory that an offer cannot exist unless there is a person whose mind is meeting that of the person who accepts. Similarly, since the offer is made to a specific person and not to the public, the death of the offeree destroys the offer. In general, insanity will terminate the offer.[35] If, however, performance has been completed so that the parties cannot be put back in their original position, the contract will stand.[36]

20. **Same subject—Acceptance not in terms of offer.**—Where the offeree does not accept in the manner provided for by the offer, it is terminated. A sent a letter to B by a wagon. The letter offered flour for sale, and notified B to answer in a letter to be returned by the wagon. Instead, B posted his letter of acceptance, in order that it would reach A sooner. The failure to accept in the manner prescribed by the offerer, namely, by wagon, was considered a refusal of the terms of the offer as made,

[34] Offord v. Davies, 12 C. B. (N. S.) 748 (Eng.).

[35] Frith v. Lawrence, 1 Paige 434 (N. Y.); Pratt v. Trustees, 93 Ill. 475, LEADING ILLUSTRATIVE CASES.

[36] Beach v. M. E. Church, 96 Ill. 177.

and the rejected offer was thereby terminated. There was, therefore, no contract created.[37]

21. **Revocation of offers.**—Termination and revocation are different things. Every case of revocation requires an act on the part of the offerer, whereas, as indicated, a termination occurs without the act of the offerer. To revoke an offer, the revocation must be communicated to or brought to the knowledge of the offeree.[38] But there are authorities supporting a modification of this rule. They hold that if the offeree acquires the knowledge that the offerer revoked the offer, the revocation is to be recognized. In whatever way the knowledge was acquired, whether directly from the offerer, or indirectly from a third party, the revocation is held by those authorities to be sufficient, provided always that the offeree did not accept before that knowledge reached him.[39]

Thus, if A on Monday morning offers to sell B his horse, and on Monday afternoon changes his mind, A must notify B that he has revoked his offer. Otherwise, if B accepts on Monday before the knowledge of the revocation reaches him, A is bound by his offer and B's acceptance.

But if B, while on the way to accept A's offer, met C, who informs him that A had revoked his offer to B, some authorities, as indicated, hold that this indirect means of communicating the revocation is sufficient.

[37] Eliason v. Henshaw, 4 Wheat. 225 (U. S.), LEADING ILLUSTRATIVE CASES; Minneapolis & St. Louis Ry. Co. v. Columbus Rolling Mill, 119 U. S. 149, LEADING ILLUSTRATIVE CASES.

[38] Brauer v. Shaw, 168 Mass. 198, LEADING ILLUSTRATIVE CASES.

[39] McCauley v. Coe, 150 Ill. 311.

It must be noted, however, that inasmuch as the offerer may make his offer in such terms as he pleases, he may reserve the right to revoke without notice. Generally, also an offer made by an advertisement may be revoked by advertising such revocation as extensively as the offer had been advertised.[40]

Consequently, in the case of Sears v. Eastern R. R. Co.,[41] a recovery was allowed because the change of notice in train time was not advertised as extensively as the original time table had been advertised.

Of course, if an offer has been accepted before revocation, it may not be revoked. Nor, as has been indicated, may an offer be revoked which is kept open by a contract.[42]

22. **Continuing offers.**—Offers may be so made as to be capable of several acceptances, either by the same party or by different parties. These are called continuing offers, and there is a new contract upon each new acceptance of the offer. But the offer may be revoked before there is a subsequent further acceptance. This situation is illustrated by the case of Offord v. Davies.[43] Messrs. Davies made a written offer to Offord, the plaintiff, that if Offord would discount bills for the "C" firm, Messrs. Davies would guarantee the payment of such bills to the extent of £600 during a period of twelve calendar months. Some bills were discounted by Offord, and duly paid,

[40] Shuey v. United States, 92 U. S. 73.

[41] 14 Allen 433 (Mass.).

[42] § 17; Brauer v. Shaw, 168 Mass. 198, LEADING ILLUSTRATIVE CASES; Dickinson v. Dodds, L. R. 2 Ch. D. 463 (Eng.), LEADING ILLUSTRATIVE CASES.

[43] 12 C. B. (N. S.) 748 (Eng.).

but before the twelve months had expired Messrs. Davies revoked their offer and announced that they would guarantee no more bills. Offord, however, continued to discount bills, some of which were not paid, and then sued Messrs. Davies on the guaranty for bills discounted after the notice of revocation had been given. It was held that the revocation was a good defense to this action. The alleged guarantee was in effect a continuing offer, extending over a year, of promises for acts, and of guarantees for discounts. Each act of discount turned the offer into a promise; but, nevertheless, the entire offer could at any time be revoked, except as to discounts which had been made before notice of revocation had been given.

23. **Counter offer—Inquiry—Quotation.**—A counter offer may be accepted by the party whose offer is rejected. But a mere inquiry may not be accepted and become a contract. Thus, A offers by a letter to sell B his horse and wagon for $500. B writes that he will buy A's wagon alone for $100. A writes back accepting B's offer for the wagon. This is a counter offer by B. When A accepts this counter offer a contract is created. The original offer of A, however, has been terminated.[44]

In the case of Hyde v. Wrench,[45] A offered to sell a farm to X for £1,000. X said he would give £950. A refused, and X then said he would give £1,000. When A declined to adhere to his original offer, X tried to obtain specific performance of the alleged

[44] Pratt v. Trustees, 93 Ill. 475, LEADING ILLUSTRATIVE CASES. See § 18.
[45] 3 Beav. 334 (Eng.).

contract. The court held that an offer to buy at £950, in response to an offer to sell for £1,000, was a refusal of the original offer, and a counter offer. Consequently, the original offer terminated.[46]

But suppose A offers to sell B his horse and wagon for $500. B writes back, "Will you also sell the harness for $25 more?" A writes, "Take the wagon, horse and harness for $525." Thus far no contract has been created, for B's letter was merely one of inquiry, and did not offer to buy the harness for $25, nor to buy the horse and wagon for $500, nor to buy all three for $525. In short, there was no counter offer which A may accept, as in the example given in the preceding paragraph.[47]

Similarly, a quotation is not an offer. "We quote you San Francisco bonds at 90," is not an offer that may be accepted.[48]

24. **Offers at auction.**—The bidder, and not the auctioneer, is the one who makes the offer in an auction. The auctioneer merely solicits the bids.[49] The bids made are simply offers, are not binding, and may be withdrawn at any time before acceptance. The acceptance is announced by letting fall the hammer and knocking the article off to the bidder. Then a contract is created, and of course the bid or offer is no longer revocable.

25. **Orders for goods.**—An order sent by a person

[46] Minneapolis, etc., Ry. Co. v. Columbus Rolling Mill, 119 U. S. 149; Anson, Contracts (Huffcut's 2d ed.), § 57.

[47] Asking for an extension of time is not a counter offer, but an inquiry. Stevenson et al. v. McLean, 5 Q. B. 346 (Eng.).

[48] Johnson Bros. v. Rogers Bros., 30 Ont. 150 (Can.).

[49] Payne v. Cave, 3 Term. R. 148 (Eng.); Langdell, Summary of Contracts, § 19; Fisher v. Seltzer, 23 Pa. St. 308, LEADING ILLUSTRATIVE CASES.

to a dealer for goods is an offer to buy, and does not become a contract until it is accepted by the dealer, or some act is done on the faith of it, as the shipment or delivery of the goods.[50] It is a contract as of the state of acceptance.[51]

26. **Knowledge of terms of offer.**—If an offer contains on its face the terms of a complete contract, the acceptor will not be bound by any other terms intended to be included in it, unless it appear that he knew of those terms, or had their existence brought to his knowledge and was capable of informing himself of their nature. Cases which illustrate this rule arise when a contract has been made with a railway company for the safe carriage of the plaintiff, or of his luggage; or for the deposit or bailment of baggage in a cloak room. In each case the document or ticket delivered to the plaintiff contained terms modifying the liability of the defendant, the offerer, as carrier or bailee; in each case the plaintiff, as acceptor, alleged that the terms were not brought to his notice so as to form part of the offer which he accepted.

Where the person who received the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions. This was the decision in Henderson v. Stevenson,[52] where the plaintiff bought a ticket for transportation by steamer from Dublin to Whitehaven. On the face of the ticket were only the words "Dublin to Whitehaven." On

[50] Dent v. Steamship Co., 49 N. Y. 390; Crook v. Cowan, 64 N. C. 743.

[51] Dunlop v. Higgins, 1 H. L. Cas. 381 (Eng.); see subject, CONFLICT OF LAWS.

[52] L. R. 2 H. L. Sc. App. 470 (Eng.).

the back of the same there was a statement exempting the company from liability with reference to baggage. The vessel was lost. The House of Lords held that the steamship company must pay for the lost baggage, because the plaintiff did not know of the statements on the back of the ticket, and consequently could not have assented thereto.

But, if a writing appears on the ticket, and, in the opinion of the jury, reasonable notice is thereby given that it contains conditions, the plaintiff is then presumed to have assented to the terms. This, of course, is not a true meeting of the minds of the offerer and offeree.[53] If the purchaser knew there was a writing, and knew or believed that the writing contained conditions, then he is bound by those conditions.[54]

27. **Agreements made by post.**—An offer communicated by a letter is construed as being made during every instant of time until it has reached the person addressed, and a reasonable time has been given in which to accept or reject that offer.

Like any offer, it may be withdrawn by the sender at any time before acceptance. But the notice of withdrawal must reach or be communicated to the offeree in order to make it effective, because the acceptance of an offer by post is complete when the letter of acceptance is duly posted, properly addressed and postage prepaid. There is a complete agreement when this occurs, although the letter of withdrawal has been posted. The rule is that while the letter of revocation must reach the offeree in

[53] Anson, Contracts (Huffcut's 2d ed.), p. 16; Parker v. Ry., 2 C. P. D. 416 (Eng.).

[54] Harris v. G. W. Ry. Co., 1 Q. B. D. 515 (Eng.).

order to render it effective, the letter of acceptance completes a contract when it is duly mailed. It does not matter if the letter of acceptance fails to reach the offerer.

The offerer may, however, provide in the terms of his offer that the acceptance must be received before a contract shall be consummated. In that event, the letter from the offeree must reach the offerer.[55]

28. **Same subject—Cases considered.**—The leading case on this subject is Adams v. Lindsell.[56] There was an offer to sell wool to the plaintiff, made by a letter dated September 2nd. The letter was misdirected, and did not reach the plaintiff until September 5th. It was then accepted by a letter properly posted. But in the meantime the defendant sold the wool elsewhere. The plaintiff sued for the non-delivery of the wool. The defendant contended that the contract was not complete until the letter of acceptance reached him. As indicated, the court held that there was a contract when the letter of acceptance was mailed. The opinion intimates that the post office is made the agent for the offerer, and that the delivery of the letter to the post office is a delivery to the offerer's agent.

In the case of Byrne v. Van Tienhoven,[57] an offer was sent by post on October 1st to the plaintiff at New York. The offer suggested a reply by cable. On October 11th the plaintiff received the letter, and at once accepted by cable. On October 8th a letter was posted withdrawing the offer. Although the

[55] Lewis v. Browning, 130 Mass. 173.

[56] 1 B. & A. 681 (Eng.), LEADING ILLUSTRATIVE CASES.

[57] 5 C. P. D. 344 (Eng.).

letter of revocation was posted before the cable of acceptance was received, the plaintiff was not notified of the revocation before he accepted. Consequently, the court found that a contract existed as of the date of the cable of acceptance.

If the acceptor has the power under the postal regulations to withdraw the letter before it leaves the town, it has been held that then the post office is not the agent of the offerer, but of the acceptor, and that then the letter of acceptance must reach the offerer before a contract is made. But in McDonald v. Chemical Nat'l Bank,[58] the court holds that such power of the sender to reclaim the letter does not operate to change the general rule.[59] The holding of the case of McDonald v. Chemical Nat'l Bank (above) is further supported by the case of Henthorn v. Fraser.[60] Here, the offer was made to the offeree personally. Next day the acceptance was sent through the mail. Meanwhile, a letter of revocation was sent, but not received, until after the letter of acceptance was mailed. The court found that there was a contract. This decision in large measure does away with the idea that the post office is the agent either of the offerer or the offeree. As a matter of fact, in these cases the offerer did not use the post office to transmit the offer, so it cannot be said that the post office was his agent to receive the acceptance. Nor was the post office the offeree's agent, because then every acceptance by mail would have to be transmitted and delivered to the offerer. It would seem,

[58] 174 U. S. 610.
[59] Ex parte Cote, L. R. 9 Ch. App. 27 (Eng.).
[60] 2 Ch. Rep. 27 (Eng.).

therefore, that, regardless of the sort of means used to communicate the offer, the acceptance made by mail is complete when duly posted.[61]

It is well settled, both in the United States and England, that the rules applicable to communications by post, govern communications by telegraph.[62]

29. **Meeting of minds.**—The great essential of every true contract is the meeting of the minds of the parties, the *consensus ad idem* (consent to the same thing). This meeting of minds occurs in the steps of offer and acceptance. Does B's acceptance coincide with A's offer? The affirmative answer to this question determines that there is such an acceptance of A's offer as will create a contract. If the acceptance does not cover the offer, but varies in some term, there is no contract, for it is the meeting of the minds of the parties that creates a true contract.[63]

While this is the usual statement of the law, it cannot be taken too literally. To act fairly, the court may construe a situation to be a contract although there is no actual meeting of minds; for example, the case of a contract where the acceptance by mail of A's offer is sent after the revocation by A but before knowledge of the revocation is received by B.

[61] American cases are uniformly agreed that the rule as stated is the law: that if the acceptor is expressly or impliedly invited to use the post, the acceptance is complete when the letter of acceptance is mailed. Tayloe v. Merchants' Fire Ins. Co., 9 How. 390 (U. S.), LEADING ILLUSTRATIVE CASES. In Massachusetts, however, the law is that an acceptance by post only takes effect when it reaches the proposer. McCulloch v. Ins. Co., 1 Pick. 278 (Mass.).

[62] Contracts by Telegraph, 14 American Law Register, 401; Trevor v. Wood, 36 N. Y. 307; Minn. Linseed Oil Co. v. Collier White Lead Co., 4 Dill. 431 (U. S. C. C.), LEADING ILLUSTRATIVE CASES.

[63] Putnam v. Grace, 161 Mass. 237, LEADING ILLUSTRATIVE CASES.

30. **Rewards.**—The general rule is that to be accepted the offer must be known. But there is a peculiar line of cases relating to the question of rewards which requires comment. Generally, where A offers a reward for the return of his stolen automobile, and B, who finds it, has no knowledge of the reward, B may not recover the reward.[64] Similarly, where B gives information of the whereabouts of the automobile, knowing of the reward, it seems that B may not recover.[65]

But there are cases contrary to these rules. Under their decisions the reward need not be known in order to recover upon the offer when the party furnishes the desired information.[66] In Williams v. Carwardine,[67] the plaintiff, when near death, gave information for which a reward was offered. She told for the purpose of revenge, and not to receive the reward, but recovery was allowed.

31. **How acceptance may be made.**—An acceptance of an offer must be an act which is manifested externally, so that others may know or realize that there is an acceptance. In short, merely deciding within one's own mind that one will accept an offer is not sufficient.[68]

The acceptance of an offer may be by express words

[64] Fitch v. Snedaker, 38 N. Y. 248, LEADING ILLUSTRATIVE CASES.

[65] Vitty v. Eley, 51 N. Y. App. Div. 44; Hewitt v. Anderson, 56 Cal. 476.

[66] Dawkins v. Sappington, 26 Ind. 199, LEADING ILLUSTRATIVE CASES; Auditor v. Ballard, 9 Bush 572 (Ky.); Gibbon v. Proctor, 64 Law Times, (N. S.) 594 (Eng.).

[67] 4 B. & A. 621 (Eng.), LEADING ILLUSTRATIVE CASES.

[68] See Anson, Contracts (Huffcut's 2d ed.), § 29; Williams v. West Chicago St. Ry., 191 Ill. 610; Hobbs v. Massasoit Whip Co., 158 Mass. 194, LEADING ILLUSTRATIVE CASES.

or by conduct. Where an offer is made and neither accepted nor rejected expressly, but the party to whom the offer is made proceeds in the matter and derives profit or benefit from it, or asserts rights over the thing in regard to which the offer is made, here the offer is held to be impliedly accepted. Or, if some particular thing is to mark the acceptance, a doing of this thing completes the contract. A letter asked if goods would be supplied at a certain price, and stated that if they would, the first cargo was to be shipped on receipt of the letter. A shipment of the cargo was held to complete the contract.[69] Thus, the acceptance may be made by making a promise in the terms of the offer, which will create a bilateral contract; or it may be made by doing an act in the terms of the offer, which will create a unilateral contract.

32. **Same subject—Silence.**—Silence does not constitute consent unless there has been such a course of dealings between the parties as to render silence equivalent to consent and acceptance.[70] This rule does not, however, permit one to frame his offer so as to impose upon the offeree the duty to speak or act. If A writes B, "We shall send you a carload of potatoes in a week unless we hear from you," and there have been no previous negotiations, the failure of B to refuse the offer will not constitute an acceptance.[71]

[69] Storm v. United States, 94 U. S. 76.

[70] Anson, Contracts (English ed.), p. 34; Royal Insurance Co. v. Beatty, 119 Pa. St. 6; White v. Corlies, 46 N. Y. 467, LEADING ILLUSTRATIVE CASES.

[71] Grice v. Noble, 59 Mich. 515; Royal Insurance Co. v. Beatty, 119 Pa. St. 6, LEADING ILLUSTRATIVE CASES.

33. **Who may accept offer.**—Only the person to whom an offer is made may accept the offer. If A offers B his horse for $100, A is not bound by C's acceptance. Where A orders ice from B, which is furnished by C, who bought B's business unknown to A, C cannot recover on a contract. C is making himself A's creditor without his consent. Such officiousness on C's part the law does not favor.[72]

But if an offer is made generally, any one who complies with its terms, knowing of the offer, may become the other party to the contract. The common example is a reward which is generally advertised.[73] A public offer to do work at fixed terms is impliedly assented to by one having work done.

34. **Advertisements as offers.**—Not every advertisement setting forth the wares of a merchant is an offer. Ordinarily, such displays are regarded as soliciting trade. The merchant is not bound to sell the advertised articles. Similar are the cases of hand-bills and circulars which merely seek to induce an offer on the part of the prospective purchaser. The theory underlying these advertisements is analogous to the situation of the auctioneer.[74]

But a circular may actually make an offer, and in such an event there will be a contract when its terms are accepted. Where a company offered a reward if anyone contracted influenza after using its remedy for a certain period of time, it was bound to pay that reward to the plaintiff, who had complied with the

[72] Boston Ice Co. v. Potter, 123 Mass. 28, LEADING ILLUSTRATIVE CASES.
[73] Anson, Contracts (English ed.), p. 54. See § 30.
[74] See § 24; Moulton v. Kershaw, 59 Wis. 316.

terms of the circular.[75] The company had placed the amount of the reward in a bank, and the court regarded that act as indicating that the circular was an offer.

35. **Cross offers.**—If offers cross, there is no contract. A writes to B on November 1st, offering to sell him his law books for $100, and at the same hour B writes to A offering to buy A's law books for $100. Since neither A nor B knew of the other's offer, there is no contract. Although the terms of each offer are the same, yet since both A and B only meant them for offers, the court may not make one of them an acceptance. To do that would take away the right of either party to revoke his offer. Such situations are called "cross offers," and it is said that two like offers are not the same as an offer and acceptance. Blackburn, J., in Pearson v. Commercial,[76] says: "The promise or offer being made on each side in ignorance of the promise or the offer made on the other side, neither of them can be construed as an acceptance of the other."

36. **Rule as to written draft.**—Generally, where the intention of the parties after a series of negotiations is to reduce the terms of the proposed agreement to writing, there is no contract until the writing is made.[77] Similarly, where the parties come to a complete understanding, but contemplate the privilege of withdrawal until the contract is reduced to a final writing, there is no contract until the instru-

[75] Carlill v. Carbolic Smoke Ball Co., L. R. (1893), 1 Q. B. 256 (Eng.), LEADING ILLUSTRATIVE CASES.

[76] 35 L. T. 445 (Eng.).

[77] Edge Moor Bridge Works v. Bristol, 170 Mass. 528.

ment is signed.[78] But if the parties do come to a complete understanding by their correspondence, a contract is created.[79] This is called a contract by incorporation by reference.[80]

[78] Donnelly v. Currie Co., 66 N. J. L. 388.
[79] Sherry v. Proal, 100 N. E. 421 (N. Y.).
[80] Sanders v. Pottlitzer Co., 144 N. Y. 209.

CHAPTER III.

REALITY OF CONSENT.

37. **Reality of consent.**—The next question to be considered in the formation of a contract is genuineness or reality of consent. Where such reality of consent is lacking, there is no contract.

There may be various causes for unreality of consent: (1) The parties may not have meant the same thing; or one or both, while meaning the same thing, may have formed untrue conclusions as to the subject matter of the agreement. This is called Mistake. (2) One of the parties may have formed incorrect conclusions respecting the subject matter of the contract, because the other party made certain statements or withheld certain facts. If this situation arises innocently, it is called Misrepresentation. (3) But if the incorrect and untrue conclusions of the one party to the contract are the result of intentional misrepresentations or active concealment of facts by the other party, there exists what is called Fraud. (4) Where the consent of one of the parties is extorted from him by actual or threatened violence, there is Duress. (5) Finally, the unusual influence, mental or moral, of one party on the other, causing no real expression of intention on the party affected, is termed Undue Influence.

38. **Mistake.**—The present discussion is concerned with the mistake of intention, and not mistake

of expression. For instance, the parties may be genuinely agreed on the terms of the contract, but the terms may, by mistake, be so expressed as not to convey their meaning. In these cases they may be permitted to explain the contract, or the mistake may be corrected. This is mistake of expression, and pertains to the interpretation of contracts.[81] But where the parties have not meant the same thing, or one or both may, though meaning the same thing, have formed untrue conclusions as to the subject matter of the agreement, it is a mistake of intention.[82]

There are several instances of mistake which will be considered in this connection.

Mistake as to the nature of the transaction. Cases involving this sort of mistake arise in the execution of written instruments, and almost of necessity arise from some misrepresentation or deceit on the part of a third party.[83] Thus where a man who is illiterate, or blind, or ignorant of the language, executes a deed conveying his property to another, which deed is misread or misdescribed to him, it is void when, in fact, the deed is a different instrument from that which he was led to believe it to be.[84]

But if a man can read and does not read the document which he signs, or if, being unable to read, he signs without having it read to him, he will not be permitted to say the contract was void.[85] "If, whatever a man's real intention may be, he so conducts

[81] See Chap. XII.

[82] Anson, Contracts (Huffcut's 2d ed.), § 176.

[83] Thoroughgood's Case, 2 Coke 9 (Eng.).

[84] Foster v. MacKinnon, 4 C. P. 704 (Eng.).

[85] Muller v. Kelly, 116 Fed. 545; Walker v. Ebert, 29 Wis. 194, LEADING ILLUSTRATIVE CASES.

himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, upon that belief, enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."[86]

Mistake as to the subject matter of a contract. This mistake occurs in three cases: (1) Mistake as to the existence of the subject matter; (2) Mistake as to the identity of the subject matter; and (3) Mistake as to the nature and essential qualities of the subject matter.

(1) If the agreement is in respect to a thing which, unknown to both parties, does not exist when the contract is made, this goes to the very root of the matter and avoids the contract. This rule is further based on the ground that the existence of the subject matter is an essential element of a contract. In Couturier v. Hastie[87] there was a sale of a cargo of corn which was supposed by the parties at the date of the sale to be in voyage from Salonica to England. The corn had been, as a matter of fact, unloaded and sold prior to the date of the agreement because it had heated and was about to spoil. The contract of sale was held to be void, because the intention of the parties was that there was something to be sold, and something to be purchased at the time, when in fact the object contemplated had ceased to exist.[88]

[86] Blackburn, J., in Smith v. Hughes, L. R. 6 Q. B. 597 (Eng.). See Anson, Contracts (Huffcut's 2d ed.), §§ 186-190.

[87] 5 H. L. C. 673 (Eng.).

[88] See Gibson v. Pelkie, 37 Mich. 380; Brick Co. v. Pond, 38 Ohio St. 65.

(2) A mistake as to the identity of the subject matter may avoid an agreement. Thus, A agreed to buy a cargo which was to arrive via the ship "Peerless" from Bombay. But later it developed that there were two ships of that name, but sailing at different dates. The buyer meant one, and the seller had in mind the other. It was held that there was no contract, for there was no meeting of the minds.[89]

(3) Where the mistake occurs as to the nature and essential qualities of the subject matter, the fact that the subject matter of the contract possessed, or failed to possess, qualities which the parties both believed or did not believe it to possess, is immaterial. That is to say, the motives which induced the assent do not affect the validity of assent when once given. Where A sold to a jeweler, B, an uncut stone for one dollar, both being ignorant of the nature of the stone, and it turned out to be a diamond worth $1,000, it was nevertheless a binding contract.[90]

But the law will not allow one party to accept a promise which he knows the other party understands in a different sense from that in which he understands it. If the mistake or misunderstanding is so known, the contract is voidable. In the case of Smith v. Hughes,[91] the defendant was sued for refusing to accept oats which he had bought of the plaintiff. His defense was that he intended and had agreed to buy old oats; whereas the oats delivered were new. The court held that it was not enough to excuse the

[89] Raffles v. Wichelhaus, 2 H. & C. 906 (Eng.); Kyle v. Kavanagh, 103 Mass. 356, LEADING ILLUSTRATIVE CASES.

[90] Wood v. Boynton, 64 Wis. 265.

[91] L. R. 6 Q. B. 597 (Eng.).

defendant that the plaintiff knew that the defendant intended and thought he was buying old oats, but to avoid the sale, the plaintiff must have known that the defendant thought he was being promised old oats. It was said that if the plaintiff knew that the defendant was contracting on the assumption of getting old oats, "he is deprived of the right to insist that the defendant shall be bound by that which was the apparent, and not the real bargain."[92]

The question is not what the parties thought, but what they said and did. A sells to X, and X believes that he is buying "this bar of gold," "this barrel of oysters," "this case of champagne." The bar turns out to be brass, the barrel to contain oatmeal, and the case to contain sherry wine. The parties are honestly mistaken as to the subject matter of the contract, but their mistake has nothing to do with their respective rights. These depend on the answer to the question: Did A sell to X a bar of metal or a bar of gold; a case of wine or a case of champagne; a barrel of provisions or a barrel of oysters? A contract for a bar of gold is not performed by the delivery of a bar of brass. A contract for a bar of metal leaves each party to take his chance as to the quality of the thing contracted to be sold, but this again would not be performed by the delivery of a bar of wood painted to look like metal. Such a failure to deliver the article sold, or the delivering of one of a different character, is not mistake of intention, but merely failure of consideration:—failure to perform the

[92] Anson, Contracts (Huffcut's 2d ed.), §§ 132-134; Shelton & Co. v. Ellis, 70 Ga. 297, LEADING ILLUSTRATIVE CASES.

terms of the contract. The contract exists, but is broken; but where there is mistake of intention, there is no contract created.

Mistake as to the identity of parties. Such a mistake arises where A contracts with B, believing him to be C. Here, whether the mistake arises through B's false representation that he is C, or whether B merely accepts A's offer which was meant for C, there is no agreement. When a person intends to contract with another he cannot be compelled to accept a third person as the other party to the contract. "Every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent."[93]

If A has no definite person in mind, as where he makes a general offer in the case of a reward, this question does not arise. Nor does it apply to the case of a contract with an agent of an undisclosed principal, because of the principles of the law of principal and agent.

39. **Mistake of one party only.**—A mistake of one party only, not known to the other, is generally no ground for avoiding the contract. The test is to determine whether or not the mistake is as to the substance of the whole consideration, and going to the very root of the matter, and not only to some point, although material, which does not affect the substance of the whole consideration. If the mistake is as to the former, then there is in reality a failure of consideration, which is a defense to the contract. If it is the latter, the contract is valid. Unless there

[93] Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 387.

is a mutual mistake, or the presence of undue influence or fraud, there is usually little or no ground for avoiding the contract for mistake.

In Brown v. Levy,[94] A made an offer to B to erect a building for a certain amount. B accepted the offer, and although A had made a mistake in adding up the items of his estimates to the extent of ten thousand dollars, it being no fault of B, the contract was held to be binding.

40. **Mistake in motive.**—Similarly, a mistake in the motive or inducement which led A to enter into the contract is no ground for avoiding the agreement. If he leases a tract of land under the mistaken belief that there is a vein of coal in it, he is nevertheless bound by the lease, although later he finds no such coal.[95] If one orders a greater quantity of an article than he requires, although the mistake was reasonable and justifiable, this is no ground to compel the vendor to give up his rights under the contract.[96]

Shrewd business transactions are not restricted by the courts, unless there are elements of fraud or misrepresentation. Where A purchases land from B at $25 per acre, knowing that valuable minerals have been found on adjoining farms, B cannot complain of the bargain. B's mistake, if there is one, is not sufficient to avoid the contract. Whether or not A owes B a duty to disclose such facts is another question to be considered later under the topic of misrepresentation.

[94] 69 S. W. 255.
[95] Jeffreys v. Fairs, 4 Ch. D. 448 (Eng.).
[96] J. A. Coates & Sons v. Buck, 93 Wis. 128.

41. **Mistake of law.**—It is generally said that a mistake, in order to affect the enforcement of a contract, must be one of fact. A mere mistake of law will not disturb the status of the agreement. Such a mistake occurs where a person knows the facts of the case, but is ignorant of the legal consequences.[97]

Certain exceptions appear to this general rule. Thus, while it is presumed that everyone knows the general rules of law, this presumption, it is urged, should not apply to private rights.[98] Such matters should be regarded as questions of fact. It is settled, moreover, that what is the law of a sister state or foreign country is a question of fact.[99] In general, however, a statement by A to B, as to what the law is, will be regarded as a matter of opinion, upon which the other party relies at his peril.[1]

42. **Effects of mistake.**—The effect of a mistake is to avoid the contract. If the contract is executory, the party may repudiate it and set up the mistake as a defense to an action upon the contract. If money has been paid, or services rendered, an action in quasi-contract will lie to recover such money or the value of the services.[2]

43. **Misrepresentation.**—Misrepresentation means an innocent misstatement or non-disclosure of facts. It should be distinguished from fraud, which consists in making representations known to be false. The

[97] Mowatt v. Wright, 1 Wend. 355 (N. Y.).

[98] Cooper v. Phibbs, L. R. 2 H. L. 149 (Eng.).

[99] Norton v. Marden, 15 Me. 45.

[1] Fish v. Cleland, 33 Ill. 237.

[2] See subject, QUASI-CONTRACTS. Equity furnishes further remedies. See subject, EQUITY.

practical test of fraud as opposed to mere misrepresentation is that fraud gives rise to an action for deceit, while innocent misrepresentation does not.

Misrepresentations made by one party to another, or innocent non-disclosure of facts, only affect the validity of certain contracts in which the greatest of good faith between the contracting parties is required. Examples are contracts of insurance, sales of land, and purchase of shares in companies.[3] As a rule, subject to the exceptions noticed, misrepresentation does not affect the validity of the contract.

"The strong tendency of the courts has been to bring, if possible, every statement, which, from its importance, could affect consent, into the terms of the contract. If a representation cannot be shown to have had so material a part in determining consent as to have formed, if not the basis of the contract, at any rate an integral part of its terms, such a representation is set aside altogether."[4]

The contracts which are affected in their formation by misrepresentation or non-disclosure are of a nature that one of the parties must rely upon information furnished by the other, and more confidence must of necessity be placed in the party making the disclosures. Such contracts are said to be *uberrimae fidei*; that is, of the most abundant good faith.[5]

Marine insurance. In McLanahan v. Universal Ins. Co.,[6] the court, speaking of marine insurance,

[3] Anson, Contracts (English ed.), p. 137.

[4] Anson, Contracts (English ed.), p. 139. See Wilcox v. The Iowa Wesleyan University, 32 Ia. 367, LEADING ILLUSTRATIVE CASES.

[5] Walden v. La. Ins. Co., 12 La. 134, LEADING ILLUSTRATIVE CASES.

[6] 1 Pet. 170 (U. S.).

holds that "the contract of insurance is one of mutual good faith; and the principles which govern it are those of enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any fact material to the risk, which he does not disclose." Every fact which would influence the acceptance or rejection of the risk by the underwriter, is material, and must be communicated. Any concealment, although resulting from accident or mistake, will, when material, avoid the policy.[7]

Fire insurance. In the contract of fire insurance the description of the premises is a representation on the truth of which the validity of the contract depends.[8] But it is said that not so high a degree of good faith and diligence is required in fire insurance as in marine insurance, and the rule of marine insurance that the insured is bound, without inquiry, to disclose every fact within his knowledge material to the risk, does not apply to its full extent.[9] Now, where applicants for insurance fill out the inquiries submitted, in writing, an innocent failure to communicate facts about which the insured was not asked, will not avoid the policy of insurance.[10]

Life insurance. The contract of life insurance differs from those of marine and fire insurance in this respect: untruth in the representations made to the insurer as to the life insured will not affect the val-

[7] Lexington Ins. Co. v. Paver, 16 Ohio St. 324; see subject, INSURANCE.
[8] Anson, Contracts (Huffcut's 2d ed.), § 212.
[9] Wood, Fire Insurance, § 196, note.
[10] Washington Mills Co. v. Weymouth Ins. Co., 135 Mass. 505; Browning v. Home Ins. Co., 71 N. Y. 508. See subject, INSURANCE.

idity of the contract, unless they be made fraudulently, or unless their truth be made an express condition of the contract. But in Vose v. Eagle Life & Health Ins. Co.,[11] it is said: "An untrue allegation of a material fact will avoid the policy, though such allegation or concealment be the result of accident or negligence or design." The rule seems to be that if the representations were material to the risk and falsely made, they avoid the policy.[12]

Sale of land. In agreements of this nature a misdescription of the premises sold or the terms to which they are subject, though made without any fraudulent intention, will vitiate the contract.[13] In this situation the contract is not strictly *uberrimae fidei,* (of greatest good faith); although latent defects in the title should be disclosed by the vendor, yet if the vendor has said or done nothing to throw the purchaser off his guard or to conceal a patent defect, there is no fraudulent concealment on the part of the vendor. The purchaser has an opportunity of inspecting and judging for himself; and the principle of *caveat emptor* (let the buyer beware) applies.[14]

Purchase of shares in companies. Those who issue a prospectus holding out to the public the great advantage which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations

[11] 6 Cush. 42 (Mass.).

[12] Campbell v. New Eng. Mutual Life Ins. Co., 98 Mass. 396. See subject, INSURANCE. Phoenix Mutual Life Ins. Co. v. Raddin, 120 U. S. 183, LEADING ILLUSTRATIVE CASES.

[13] Anson, Contracts (Huffcut's 2d ed.), § 214.

[14] Addison, Contracts, vol. II, p. 914.

therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, extent and quality of the privileges and advantages which the prospectus holds out as inducements to take shares.[15]

44. **Expressions of opinion.**—Generally, the representation must be a representation of fact. An expression of an opinion is not such a representation. Thus, commendatory expressions as are ordinarily used to induce purchasers to buy are not treated as fatal representations, although occurring in the special contracts just mentioned, and more extravagant than correct.[16] But a statement of opinion in regard to facts peculiarly within the knowledge of the party making the statement may amount to a representation that the party making the statement knows facts which justify his opinion.[17]

45. **Representations of law.**—A representation as to what is the law ordinarily does not affect the contract.[18] But a statement of fact which involves a conclusion of law is nevertheless a statement of fact.[19] Ordinarily, A is not justified in relying upon B's representation in regard to the law. If B occupies a fiduciary position with reference to A, or if from

[15] Per Kindersley, V. C. in New Brunswick & Canada Ry., etc., Co. v. Muggeridge, 1 Drew & S. 363.

[16] Anson, Contracts (Huffcut's 2d ed.), §§ 208, 209.

[17] French v. Ryan, 104 Mich. 625.

[18] Fish v. Cleland, 33 Ill. 237, LEADING ILLUSTRATIVE CASES.

[19] Motherway v. Wall, 168 Mass. 333.

B's superior means of information, A is reasonably entitled to accept the former's statements in regard to the law, the representation has the same effect as in the case of a statement of fact.[20] The law of a foreign jurisdiction being a question of fact, a representation thereunto would be a representation of fact.[21]

46. **Misrepresentation—Conditions—Warranties.**—If a representation is a part of the contract itself, and does not merely affect the formation of the contract, it becomes a condition or a warranty. In such event, the fact that the representation is false operates either to discharge the injured party from his obligation, or to give to him a right of action based on the contract for loss sustained by reason of the untruth of the statement. The statement, in such a case, has become a term of the contract itself.[22]

"Properly speaking, a representation is a statement or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract, and consequently the contract is not broken, though the representation proves to be untrue. * * * A question, however, may arise whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This

[20] Ross v. Drinkard's Adm'r, 35 Ala. 434, LEADING ILLUSTRATIVE CASES; Sims v. Ferrill, 45 Ga. 585.

[21] Wood v. Roeder, 50 Neb. 476.

[22] See § 166, Chap. XIII.

is a question of construction, which the court, and not the jury, must determine."[23]

47. **Representation must be acted upon.**—The party to whom the representation is made must be induced thereby to enter into the contract. That is, he must be ignorant of the facts, must believe the representation, and must enter into the contract as a result thereof. It is sufficient if the misrepresentation is the material inducement.[24]

The party acting on the misrepresentation must have been justified in so acting; that is, the representation must have been made either to him personally, or to a third person to be communicated to him. Thus, a report to the Secretary of State of the affairs of a corporation, filed as required by law, is not a representation upon which anyone is justified to act, because it is not made to anyone except the state and because it is made by compulsion.[25] But a representation to a commercial agency is intended to be acted on by the public.[26]

48. **Care by party.**—Not only must the representation be acted upon within a reasonable time after it is made,[27] but some courts further require a person to use reasonable diligence to discover for himself facts obvious to an ordinary observer. This is true especially where the means of knowledge are equally available to both parties. If he fails to do this he

[23] Williams, J., in Behn v. Burness, 3 B. & S. 751 (Eng.); see CONDITIONS, Chap. XIV.

[24] Ruff v. Jarrett, 94 Ill. 475.

[25] Hunnewell v. Duxbury, 154 Mass. 286.

[26] Butterfield v. Barber, 20 R. I. 99.

[27] Sharpless v. Gummey, 166 Pa. St. 199.

cannot set up that he has been misled by the other party.[28] Thus, if A, able to read, signs a contract without reading it, he cannot have it set aside for misrepresentation by the other party as to its contents.[29] But many courts are adopting the more rational rule that if A has deceived B, the former has no right to say, "You ought not to have trusted me," if B has actually relied on his misrepresentations.[30]

49. **Effect of misrepresentation.**—Mere representation, although it be false and material, if not knowingly false so as to constitute fraud, will not generally support an action for damages.[31] In contracts *uberrimae fidei,* in which innocent misrepresentation avoids the contract, such a misrepresentation may be set up as a defense to an action at law on the contract. Furthermore, it may be ground for rescission or reformation in equity.

50. **Fraud.**—Where untrue conclusions have been induced by representations of one party, made with a knowledge of their untruth, and with the intention of deceiving, it is fraud.[32]

To constitute fraud in law, there must be a false representation of fact. Furthermore, the falsity must be known. A false representation made recklessly and without regard to its truth or falsity may satisfy this requirement. But it must be made with the intention that it should be acted upon by the

[28] Slaughter's Adm'r v. Gerson, 13 Wall. 379 (U. S.).

[29] Kimmell v. Skelly, 62 P. 1067 (Cal.).

[30] Bigelow, Fraud, p. 524.

[31] Wakeman v. Dalley, 51 N. Y. 27.

[32] Fish v. Cleland, 33 Ill. 237, LEADING ILLUSTRATIVE CASES; Anson, Contracts (Huffcut's 2d ed.), §§ 196, 220.

complaining party. Lastly, the party must act upon the false representation.

(a) *False representation of fact.* A mere innocent non-disclosure does not constitute fraud. There must be some active attempt to deceive, either by a statement which is false, or by a representation, true as far as it goes, but accompanied with such a suppression of facts as to make it convey a false impression. Or, there must be a concealment of facts which a party is under a duty to disclose to another party.

In Ward v. Hobbs,[33] the defendant sent pigs to a public market knowing that they were suffering from a contagious disease. They were sold "with all faults" to the plaintiff. A large number of them died from the disease, and other pigs of the plaintiff were infected with the disease. It was claimed for the plaintiff that the placing of the pigs in the market for sale amounted to a representation that they were free of disease of a contagious nature. In the Court of Appeals it was held that the facts did not authorize the jury to find that the defendant represented the pigs as free from infectious disease.[34]

So it was held that where the defendant rented a house which he knew was desired for immediate occupation, and knew that it was in an unfit and dangerous state, but did not disclose this fact to the plaintiff; the action for fraud would not lie. This was so because there was no representation or warranty, expressed or implied, that the house was fit for occu-

[33] 3 Q. B. D. 150 (Eng.).
[34] Anson, Contracts (Huffcut's 2d ed.), §§ 221, 222.

pation.[35] But it is also held to be the duty of the landlord to inform the tenant of the existence of any nuisance on a premise which may be prejudicial to life or health, and if this information is not given an action for fraud or deceit will lie.[36]

It must be a representation of fact, and not a mere expression of opinion or intention, if it is to constitute fraud. A representation by the seller that an article is worth a given sum, is a mere expression of opinion and not a representation of fact.[37] So, statements as to the cost of an article are treated as mere opinions unless made under such circumstances as justify the buyer in relying on them as statements of fact.[38]

As regards intention, it is to be observed that while a statement of future intention is not a statement of fact, a false expression of present intention is such a fraud as invalidates the contract. For example, the purchase of goods with the intention not to pay for them is held to be a fraudulent misrepresentation.[39] But mere insolvency or lack of reasonable expectation to pay is insufficient.

(b) *Made with knowledge of its falsehood or in reckless disregard of its truth or falsity.* A statement made with knowledge of its falsehood, or in reckless disregard of its truth or falsity, is an element of fraud. If a representation is made without knowledge of its being false, and without such reck-

[35] Keates v. Cadogan, 10 C. B. 591 (Eng.).
[36] Cesar v. Karutz, 60 N. Y. 229.
[37] Noetling v. Wright, 72 Ill. 390.
[38] Cooper v. Lovering, 106 Mass. 77.
[39] Donaldson v. Farwell, 93 U. S. 631.

lessness of statement as constitutes bad faith, the party injured has no right of action.[40]

It is not necessary that a dishonest motive be present to constitute fraud. Representations in fact false, though believed or hoped to be true, if not justified by the knowledge of the party making them, will constitute fraud.[41]

(c) *Made with intention to be acted upon by the complaining party.* This does not require that the statement be made to the injured party, for if damage results from the false statement as a direct consequence, the party guilty of the fraud is responsible to the party injured.

In Langridge v. Levy,[42] a gun was sold to the father of the plaintiff upon the representation that the gun had been made by "Nock" and was "a good, safe and secure gun." The plaintiff used the gun, it exploded, and injured him to such an extent that his hand had to be amputated. The representations made by the seller of the gun were proven to be untrue, and the court held that he was liable upon them although made to the father and not to the plaintiff.

Where a druggist negligently labels poison so that it appears as a harmless medicine and sells it to dealers in medicines, he is liable to any one who buys it and is injured by its use, provided there is no negligence on the part of the retailers.[43]

[40] Cole v. Cassidy, 138 Mass. 437; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, LEADING ILLUSTRATIVE CASES.

[41] Polhill v. Walter, 3 B. & A. 114 (Eng.); Anson, Contracts (Huffcut's 2d ed.), § 223.

[42] 2 M. & W. 519 (Eng.).

[43] Davidson v. Nichols, 11 Allen 514 (Mass.).

So, it is held that representations made to commercial agencies by business firms as to their financial standing and responsibility for the purpose of securing credit and a rating, if untrue, will form the basis of an action for deceit by a person dealing with the firms on the strength of the representations.[44]

(d) *The representation must induce the party to act.* Necessarily, unless the party to whom the representation was made acted upon it, he is not injured and cannot complain. The plaintiff cannot establish a title to relief simply by showing that the defendant has made a fraudulent statement. He must also show that he was deceived by the statement and acted upon it to his prejudice.[45]

51. **The effect of fraud.**—The effect of fraud upon the contract is to be distinguished from the right given the injured party, both at common law and in equity, to recover from the injuring party the loss occasioned by the fraud. The perpetration of a fraud gives the injured party a right to recover independent of contract, and also affects the rights of the parties under the contract. It is the effect which fraud has on the contract that is now considered.

The party to the contract who has been injured by the fraud of the other party, has a two-fold right: he may, on discovery of the fraud, affirm the contract, retain the article or goods sold, and sue for the damage sustained because of the fraud; or, he may elect to rescind the contract, and may then resist an action brought upon it at common law, or for

[44] Lewis v. Jewell, 151 Mass. 345, LEADING ILLUSTRATIVE CASES.
[45] Marshall v. Hubbard, 117 U. S. 415; Bartlett v. Blaine, 83 Ill. 25.

specific performance in equity, or he may then obtain a judicial avoidance of it in equity.

The contract, until the injured party has elected his remedy, is voidable, and not void. The right is limited in this, that it must be exercised before accepting a benefit with knowledge of the fraud, and before dealing with the subject matter of the contract so that the position of the parties cannot be restored, and also before innocent third parties have acquired an interest for value under the contract.[46]

52. **Duress.**—Where the contract is entered into by one of the parties by reason of his being coerced by actual or threatened violence, the contract may be avoided on the ground of duress. The contract is voidable, not void; that is, the party under duress may stand by the contract or seek to have it made unenforcible.[47]

The older cases limited duress to cases involving bodily harm or imprisonment, or threats thereof. Modern cases are enlarging its scope so as to make it include all cases of unlawful interference with the person or property of another in order to compel him to make a contract.[48] Today, duress consists in the actual or threatened unlawful exercise of power possessed, or believed to be possessed by one party over the person or property of another, from which the latter has no other means of immediate relief than entering into the contract.[49]

[46] Cochran v. Stewart, 21 Minn. 435.

[47] Miller v. Minor Lumber Co., 98 Mich. 163; United Shoe Machinery Co. v. La Chapelle, 99 N. E. 289 (Ill.), LEADING ILLUSTRATIVE CASES.

[48] Harriman, Contracts (2d ed.), § 445.

[49] Radich v. Hutchins, 95 U. S. 210; Morse v. Woodworth, 155 Mass. 233, LEADING ILLUSTRATIVE CASES.

Threats by A to bring a civil action against B if B does not enter into a proposed contract do not constitute duress. Neither is it duress to threaten to take possession of property by means of a judicial writ, unless there is an attempt to abuse the process of the court.[50] On the other hand, threats of criminal prosecution made for the purpose of compelling another to enter into a contract constitute duress.[51] But if A, who has been arrested on a bastardy charge, marries the prosecutrix B to avoid imprisonment, this will not constitute duress so as to annul the marriage.

The offense for which arrest is threatened should be specified, and there must be some present means of executing the threat.[52] Although the rule is usually said to require that the threatened imprisonment must be unlawful, nevertheless, to take advantage of a lawful imprisonment to further one's private ends may constitute duress.[53]

Generally, the duress must affect the promisor and not some third party. But a husband may avoid a contract for duress to his wife, and a wife for duress to her husband.[54] Similarly, a parent may avoid for duress to his child; a child for duress to his parent; and a sister for duress to her brother.[55]

53. **Undue influence.**—Circumstances may render one of the parties of a contract mentally or morally

[50] Davis v. Rice, 88 Ala. 388.
[51] Thompson v. Niggley, 53 Kan. 664.
[52] Galusha v. Sherman, 105 Wis. 263.
[53] Morse v. Woodworth, 155 Mass. 233.
[54] City National Bank v. Kusworm, 88 Wis. 188.
[55] Bryant v. Peck & Whipple Co., 154 Mass. 460; Schultz v. Catlin, 78 Wis. 611.

incapable of resisting the will of the other, so that his consent is not real. This is undue influence. The line between duress and undue influence is frequently difficult to ascertain. The growth of equitable doctrines in the common law courts, and the confusion of legal and equitable procedure in many states, have left the line between duress and undue influence very shadowy.

Undue influence is a sort of fraud which does not include deceit or circumvention. It means an unconscientious use of the power arising out of the circumstances and conditions of the parties. When from the relative positions of the parties the presumption of undue influence arises, the contract cannot stand unless the party claiming the benefit of it can show that it is fair, just and reasonable.[56]

The presumption of the presence of undue influence in contract may arise from circumstances as well as from the relations of the parties. Anson mentions the following as arising from the circumstances, "that equity will not enforce a gratuitous promise even though it be under seal; that the acceptance of a voluntary donation throws upon the person who accepts it the necessity of proving 'that the transaction is righteous'; that inadequacy of consideration is regarded as an element in raising the presumption of undue influence or fraud, but does not amount to proof of either."[57]

Of the relations between the parties which will raise the presumption of undue influence, the follow-

[56] Earl v. Morris, 8 Ch. 490 (Eng.).

[57] Anson, Contracts (Huffcut's 2d ed.), § 232.

ing are examples: The parental relations, as between uncle and niece; the confidential relations, as between attorney and client, doctor and patient; and the relation between a person and his spiritual adviser. Beyond these special relations of confidence or trust existing between parties, the courts are further inclined to hold that any influence, however gained, may raise the presumption that there has been unfair dealing.

In Smith v. Kay,[58] the influence exerted by a man advanced in years over a young person who had just obtained his majority, though neither spiritual, parental or fiduciary, entitled the young man to relief from the court. It was said that while in the special relations the influence was presumed, in the outside cases it had to be proved extrinsically. But when proved, the remedy was granted just as freely in one case as in the other.

So the courts have guarded persons against those who would take advantage of their improvidence, their moral weakness, or their ignorance and unprotected situation. Thus, expectant heirs at the common law are protected from extortionate rates of interest, and parties dealing with uneducated persons or with those under pressure will be required by the equity courts to show fairness and honesty on their part.[59]

In the case of the sale of the equity of redemption by the mortgagor to the mortgagee, the courts will scrutinize the transaction, and if there has been

[58] 7 H. L. C. 750 (Eng.).
[59] 1 Story, Equity 336.

undue influence, refuse to carry out the express agreements of the parties when it would be a gross injustice to the one party to enforce them.[60]

54. **Right to rescind for undue influence.**—In general, the right to avoid a contract for undue influence is the same as in the case of fraud, with this exception, that while an affirmation of the contract after knowledge of fraud binds the party, in the case of undue influence he will not be bound by such affirmation unless it is clear that the influence or difficulty under which he labored is entirely removed.[61]

55. **Rescission.**—Rescission may take place when the party entitled to rescind puts an end to the contract out of court, as where the buyer of an article who has been deceived by the seller tenders back the article. Or, the rescission may occur when the party entitled to rescind sets up in his plea the facts justifying the rescission. Again, the courts may rescind the contract, as in the case of undue influence.[62]

The election to rescind may be made expressly or by acts evidencing an intention not to treat the contract as binding. Furthermore, a party must exercise his right to rescind within a reasonable time after he is aware of the facts. Moreover, if the party defrauded takes any benefit under the contract or does any act implying an intention to abide by the contract, he loses his right to rescind. Thus, if A, who is the defrauded party, sues on the contract, he affirms it and rescission is barred.

[60] Dorrill v. Eaton, 35 Mich. 302.
[61] Anson, Contracts (Huffcut's 2d ed.), § 234.
[62] Harriman, Contracts (2d ed.), chap. 24.

A contract may be rescinded only where it is possible to place the parties in statu quo, that is, in their original position and with their original rights. Moreover, it must be rescinded wholly, and not in part. A party may not affirm a contract in part and repudiate it in part. The rescinding party must also restore the consideration which he has received under the contract. Thus where A has been induced by fraud to buy goods, in order to avoid the contract upon the discovery of the fraud, he must return the goods. Consequently, after consuming the goods wholly or in part the buyer may not avoid the contract. But where the thing is utterly worthless, as a forged note, the party defrauded need not return it. Another rule adopted by some modern cases is to credit that which was received, rather than to require its return. This doctrine has arisen because a strict observance of the restoration rule frequently protects the party guilty of fraud.[63]

[63] O'Brien v. Chicago, etc., R. Co., 89 Ia. 644; Chicago, etc., R. Co. v. Lewis, 109 Ill. 120.

CHAPTER IV.

CONTRACTS UNDER SEAL.

56. **History of sealed instruments.**—Historically, the earliest forms of contract depended for their validity entirely upon their form. It was necessary to attach a seal to an agreement in order to make it binding. Later, through the influence and efforts of courts of equity, the doctrine of consideration arose. There were then two methods of creating a contract: one was to attach a seal, the other was to furnish a consideration.[64] Through modern legislation and decisions, courts have forgotten the history of the law of contracts and now state the rule to be that every contract requires a consideration, and that a seal is sufficient because it imports a consideration. This is an incorrect statement, for seals existed before the doctrine of consideration arose. Moreover, in equity proceedings, the chancellor will not enforce a contract under seal, unless there is a consideration. This demonstrates the inconsistency of the statement that a seal imports a consideration, for if it does, then the specialty should be enforced. It is sufficient to say that in a court of common law, a seal requires no consideration.[65]

57. **Seals.**—Seals are of two kinds, public and private. Public or official seals are those used by

[64] 2 Pollock & Maitland, History of English Law, 184-233; Ames, History of Assumpsit, 2 Harvard Law Review 53.

[65] McMillan v. Ames, 33 Minn. 257, LEADING ILLUSTRATIVE CASES.

public officers for the authentication of public documents. Private seals are those used by individuals in the execution of personal or private contracts. Any contract may be under seal, if the parties so elect; and there are some contracts which are invalid without a seal, as a deed for the conveyance of real estate. At common law there must be an impression to constitute a seal. But by statutes, a seal may be either of wax, or of ink, or a wafer. It may be in print, or it may be a scrawl. Seals are made in various ways, the most common forms being "(L.S.)" or "(SEAL)."

One seal may do for any number of parties signing a deed, if each one adopts it as his own. Naturally, as a practical matter, it is advisable to have a separate seal for each signature.[66]

58. **Contracts under seal and specialties.**—A contract under seal, or a specialty, may be sued upon in a court of common law, regardless of the passing of a consideration. One may make a gift in writing and if he places his seal thereon he is liable in damages if he refuses to abide by his writing. It is the presence of the seal that makes a specialty enforcible at common law, and this is true regardless of the question of consideration. There are two cases under the old common law which require that contracts be under seal. The one, as indicated, is where the contract has no consideration; the second is where the contract was made by a corporation. The latter rule is generally repudiated in the United States. The old common law did not, however, require a

[66] Walker, American Law, pp. 463-464; Pickens v. Rymer, 90 N. C. 282.

conveyance of land to be by deed and under seal, but this has become necessary in most jurisdictions.[67]

At common law, the presence of a seal precluded the denial of the recitals of the contract. Statements made in a deed under seal were absolutely conclusive against the parties.[68] Furthermore, a contract under seal, being of a higher nature, superseded a simple contract upon the same subject matter. This is the doctrine of merger.[69] Similarly, a debt due under a sealed contract was entitled to a priority out of the assets of the deceased, before debts due upon contracts not under seal. But this doctrine has been generally eliminated by statutes of distribution.[70]

Quite generally a right of action arising upon a simple contract is barred by the Statutes of Limitations in less time than an action arising from a contract under seal.[71]

59. **Same subject—Deeds, bonds, records.**—(1) Deeds. The term "deed" is applicable to all contracts under seal, but it is now most frequently used in a limited sense to denote an instrument for the conveyance or incumbrance of real estate. Its execution consists in its being "signed, sealed and delivered," and it is then conclusive between the parties. Its form and requisites will be fully discussed under the subject, Real Property, in a subsequent volume of this series.

Formerly there was a distinction between instru-

[67] See subject, REAL PROPERTY; Clark, Contracts (2d ed.), § 64.
[68] 2 Kent, Commentaries, p. 464; Sage v. Jones, 47 Ind. 122.
[69] Banorgee v. Hovey, 5 Mass. 11.
[70] Walker, American Law, p. 465.
[71] See "Limitations of Actions" in state statutes.

ments termed deed poll and indenture. A deed poll was a deed made by one party, and the parchment on which it was written had a smooth edge. An indenture was made by two parties. The matter was copied for each party on the same parchment, and the copies were then cut apart with indented edges. The parts could be identified by fitting them together. This distinction is no longer of importance except to designate the origin of the terms, deed poll and indenture, which are still used to designate instruments of one and of two or more parties, respectively.

(2) Bonds. A bond is an instrument under seal acknowledging the existence of a debt. It differs from a covenant in that the latter is always an executory contract for something future, though each is called a "writing obligatory." Bonds are of two kinds, single bonds and penal bonds. A single bond, frequently called a single bill, is a simple acknowledgment of indebtedness without any condition of qualification; as if A, under hand and seal, acknowledges himself indebted to B for a given sum. A penal bond is an acknowledgment of indebtedness, accompanied by a condition, upon compliance with which such acknowledgment is to be void. The sum here made as a debt is called a penalty, because it is inserted merely to secure the performance of the condition, which is the principal thing. It is held that an action will not lie to recover a penalty, unless it be under a seal.[72]

(3) Records. Specialties of record are obligations of indebtedness evidenced by judicial records. The

[72] Walker, American Law, pp. 466, 467.

records form the highest evidence, and the only question that can be controverted is, whether the records exist. So specialties of record are the highest form of specialties. They are of two kinds: recognizances, and judgments or decrees. A recognizance is an acknowledgment of indebtedness made before a court or authorized officer, with a condition making it void on the happening of certain things mentioned in it, and the whole forming part of the record of the case. A judgment or decree is the final decision of a court upon a matter submitted to it, and being entered of record forms the highest kind of a specialty, as its terms admit of no dispute, but are proved by the production of the record. It merges the previous rights, and gives the judgment creditor convenient remedies not before his, as the right to issue execution, the creation of a lien, and the like.[73]

60. **Same subject—Delivery and form.**—The specialty must not only be sealed, but it must be delivered, in order to make it binding. This delivery is sometimes made by giving the instrument to a person not a party thereto, to be delivered to the other party upon the happening of an event. Such a delivery is called an escrow. But merely to part with the possession of the specialty is not sufficient, unless it is intended thereby to render it effective.[74]

Furthermore, to constitute a sufficient delivery, it is generally held in the United States that there must be an acceptance by the other party.[75] But it seems

[73] Anson, Contracts (Huffcut's 2d ed.), § 76.

[74] Roberts v. Security Co. (1897), 1. Q. B. 111 (Eng.).

[75] Meigs v. Dexter, 172 Mass. 217, 52 N. E. 75. This is not the rule in England.

that where the instrument is clearly beneficial to the other party, its acceptance will be presumed.[76] This is especially true where the other party is an infant. Of course no such presumption arises, even if beneficial, where the acceptance is in fact refused.[77]

As the delivery is the act making the specialty operative, its date is the date of delivery, regardless of the date of the instrument. Ordinarily, however, until otherwise proved, the date of the instrument is presumed to be the date of delivery.[78]

No particular form of words is necessary in order to constitute a sealed instrument. But as a general rule, a written agreement cannot be said to be a completed contract until it is signed by all the parties.[79] The parties may, however, adopt it without signing, if the intention is clear that there is to be no signature.[80] The signature may appear anywhere on the instrument.

A deed which is sealed and delivered, but which omits a material part, is called a deed executed in blank. Such an instrument is void, and cannot be made good by subsequently filling in the blank without a new execution.[81]

61. **Same subject—Statutory changes.**—Statutes have modified or abolished the use of seals in many states. There exist three classes of states with reference to such legislation. The first class permits the

[76] Peavey v. Tilton, 18 N. H. 151.
[77] Butler and Baker's Case, 3 Coke 25a (Eng.).
[78] Faulkner v. Adams, 126 Ind. 459; 26 N. E. 170.
[79] Mattoon v. Barnes, 112 Mass. 463.
[80] Dillon v. Anderson, 43 N. Y. 231.
[81] Powell v. Duff, 3 Camp. 181 (Eng.).

use of the seal and generally follows the rules of the common law in the enforcibility of sealed instruments. Here, the absence of consideration in a sealed contract may not be proved.[82] These are usually the common-law states. The second class permits the use of the seal, but will allow evidence of the absence of a consideration.[83] The third class has abolished the use of seals. Here, every contract must have a consideration.[84]

Other changes have modified the rules respecting specialties. The action of assumpsit, in place of covenant, on a specialty is permitted even in common-law states.[85] Similarly, the rule that a specialty could be destroyed or modified only by an instrument of like dignity, i. e., a sealed instrument, has been changed. Now, such a contract may be rescinded orally or modified by a subsequent agreement.[86]

[82] Illinois is an example.

[83] Aller v. Aller, 40 N. J. L. 446.

[84] Code states such as California, Kentucky, Ohio, Indiana, Iowa, Kansas; Stimson, American Statute Law, p. 455.

[85] Illinois.

[86] Bishop, Contracts, § 130.

CHAPTER V.

CONSIDERATION.

62. **Definition of consideration.**—The law requires that every simple contract be based upon what it considers a valuable consideration. Consideration is that which moves from the promisee to the promisor, at the latter's request, in return for his promise.[87] Anson defines consideration to be "something done, forborne or suffered, or promised to be done, forborne or suffered, by the promisee in respect of the promise."[88] It is said that where there is a benefit to the promisor, and a detriment to the promisee, there is a consideration.

The modern conception of the principles of consideration declares that the real test of a sufficient consideration is whether or not there is a detriment to the promisee, and that the presence of a benefit to the promisor is unnecessary. Thus, in Devecmon v. Shaw,[89] the plaintiff went on a pleasure trip to Europe when his uncle told him that he would pay his expenses. Later, the uncle refused to pay. The

[87] In any action on a contract the promisor is the party who makes the promise. He is the party sued, and is called the defendant. The promisee is the party who sues, and he is called the plaintiff. Were the defendant in the first action to sue the plaintiff of the first action, in a counter suit on the contract, then the party who was originally the promisor (defendant) will become the promisee and the plaintiff in the counter action. The party who was the promisee (plaintiff) in the original action would become the promisor (defendant) in the counter action.

[88] Anson, Contracts (Huffcut's 2d ed.), § 118.

[89] 69 Md. 199.

nephew was allowed to recover in an action for breach of contract on the ground that he did something he was not going to do, nor was bound to do; namely, to go to Europe. The court held that was a consideration. "It was a burden incurred at the request of the other party." In another case, Hamer v. Sidway,[90] the uncle promised to give his nephew $5,000 on his twenty-first birthday, if he did not drink liquor, use tobacco, swear or gamble before he was twenty-one years of age. The nephew fulfilled the terms of the offer. In an action for breach of contract, this forbearance was held to be a consideration, for the nephew gave up what he had a right to do. In neither of the two cases cited was the uncle benefited, but in both did the plaintiff do or give up something he was not bound to do or give up.[91] Thus, even the giving of an oath would be sufficient to support a promise to pay a sum of money.[92] To do something one is not bound to do, as to give a promise, to do an act, or to pay money, constitutes a sufficient consideration. A legal detriment, and not a benefit, is the necessary element of a consideration.[93]

An agreement, not under seal, and without a consideration, is known as a *nudum pactum* (naked agreement), and is unenforcible; for example, A's promise to support B during his lifetime without any promise by B.

63. **Consideration distinguished from motive.**—Parties have personal reasons for entering into con-

[90] 124 N. Y. 538, LEADING ILLUSTRATIVE CASES.
[91] Cook v. Bradley, 7 Conn. 57, LEADING ILLUSTRATIVE CASES.
[92] Brooks v. Ball, 18 Johns. 337 (N. Y.).
[93] White v. Bluett, 23 L. J., Ex. 36 (Eng.).

tracts. These reasons form the basis of the motive for the agreement. But the motive is by no means the consideration. The latter is an element determining the enforcibility of the contract, and is the thing given or done by the party in reliance of the promise. The former is the cause back of the transaction. The distinction between motive and consideration is readily illustrated.

A, to provide for his wife's welfare after his death, requested C, who was to be his executor, to rent to the wife a certain house, for which A agreed to pay £1 per year. Later, C refused to perform. The plaintiff was permitted to recover, for the court held that while the motive was to carry out the wishes of the deceased husband, it was the £1 a year which A promised to pay that supported the promise.[94] This was the consideration.

64. **Valuable consideration.**—A valuable consideration consists of the detriment which has been indicated. It is "such as money, marriage, or the like, which the law esteems an equivalent given for the grant."[95] It need not be money nor a thing of pecuniary value. Thus, a promise by C to pay his divorced wife, D, an annuity if she will conduct herself in a virtuous manner, is a detriment to D. This constitutes a consideration, for D is under no obligation to her husband to remain virtuous.[96] On the other hand, a promise (not under seal) to make a gift lacks a valuable consideration and is unenforcible.[97]

[94] Thomas v. Thomas, 2 Q. B. 851 (Eng.).
[95] 2 Blackstone, Commentaries, p. 297.
[96] Dunton v. Dunton, 18 Vict. L. Rep. 114 (Victoria).
[97] Williams v. Forbes, 114 Ill. 167, 28 N. E. 463.

A full and valuable consideration is one which is a just equivalent for what is given or promised. Where A pays B the full value of a horse is an example. A valuable consideration is sufficient in law, and as between the parties can only be attacked for such gross inequity as amounts to fraud, or constitutes a fraud as against the creditors of the contracting parties. If the consideration is full and valuable, it cannot be attacked in equity by antecedent creditors, unless the contract was made with knowledge of their claims and is void for want of good faith.

65. **Valuable consideration need not be adequate.** —If a consideration is valuable it need not be adequate. The court does not require that the consideration and the thing to be done shall be in exact proportion as to values. A party is permitted to drive a good bargain, so long as he does it without deceit or fraud. But, however small it be, the consideration must have some real value.

Thus, A may agree to sell B his horse, worth $200, for $50, and the bargain will stand. If, however, the owner was induced to make the promise on account of false representations or undue influence, the inadequacy of the price would be evidence of fraud. But note that mere inadequacy of consideration does not of itself constitute fraud. Moreover, courts hesitate to disturb contracts for such inadequacy unless the agreement is highly unconscionable.

66. **Executory and executed considerations.**—An executory consideration refers to a future act; thus, a promise for a promise constitutes a contract upon executory considerations. Either may perform, or

offer to perform, and thus bind the other to fulfill or compensate for the breach.

An executed consideration arises where one of two parties has, either in the act which amounts to a proposal or the act which amounts to an acceptance, done all that he is bound to do under the contract, leaving an outstanding liability on the other party only.[98]

If a thing is done at the time a promise is given the consideration is executed; if there is only a promise to do it in return for another promise, the consideration on both sides is executory.[99] A contract with an executed consideration is unilateral; if there are two promises, each being the consideration for the other, the contract is bilateral.[1]

67. **Good consideration.**—A good consideration is founded on "motives of generosity, prudence and natural duty."[2] It is the consideration of blood relationship and resembles such a consideration as would be founded on moral laws.[3] It was once held that a person might make a binding promise to another to do something for the other's son or daughter, and that the promise would be enforcible because of the relationship. Generally, this rule has been abolished. Blood or natural affection is no longer considered such a consideration as will support a prom-

[98] The student should take notice that the terms, "executed and executory," are not used in the same sense by all legal writers; thus Walker uses "executed" in the sense of "past" (American Law, p. 439), as do a number of other writers. Bishop, Contracts, § 440; 1 Parsons, Contracts, p. 468.

[99] Anson, Contracts (Huffcut's 2d ed.), § 124.

[1] Farrington v. Tenn., 95 U. S. 679, 683.

[2] Blackstone, Commentaries, p. 297.

[3] Anson, Contracts (Eng. ed.), p. 78.

ise. There must be a legal detriment to the promisee.[4] An agreement supported only by a good consideration is a nudum pactum[5] (naked agreement).

68. **Moral consideration.**—Similar to a good consideration is that which is called a moral consideration. The latter enters into moral obligations, which derive their sanction from moral laws. Such obligations arise from benefits received in the past and from rules of honor, duty and conscience. The law, however, does not regard a moral consideration as sufficient to support a promise. Thus, a man may in honor be bound to pay money lost in a wager, but he is not in law. If A calls a doctor to attend to an unconscious injured man, B, there is a moral obligation on the part of B to repay to A the amount of the doctor's bill A paid for services, but it is doubtful if there is a legal obligation. So, where services have been rendered without request, and without expectation of payment, a subsequent promise to pay lacks a legal consideration.[6]

There exist what appear to be exceptions to the rule that a moral consideration will not support a promise. Thus, where A is indebted to B and receives a discharge in bankruptcy, if he afterwards promises to pay B the amount of the debt, B may recover. But

[4] See § 68; Fink v. Cox, 18 Johns. 145 (N. Y.), LEADING ILLUSTRATIVE CASES.

[5] Carefully distinguish between the terms good consideration and valuable consideration. Many writers speak of good considerations when they mean valuable or sufficient considerations, to-wit, those which make the agreement enforcible. See § 68.

[6] Bartholomew v. Jackson, 20 Johns. 28 (N. Y.). The case of Eastwood v. Kenyon, 11 A. & E. 438 (Eng.), abolished any possible use of a moral consideration. See Hart v. Strong, 183 Ill. 349.

it is not the moral consideration that A should pay which supports the promise. It is the consideration which arises from A's promise to do what he is not bound to do, namely, to pay a debt discharged in bankruptcy.[7] Analogous to this case are contracts by which parties agree to pay debts which have been barred by the Statutes of Limitations.[8] Many statutes provide by their terms that a written promise to pay extends the time in which the debt will be barred.[9]

69. **Unreal considerations.**—A consideration which is impossible or so vague in terms as to be practically impossible will be treated as unreal. As regards vagueness, the principle is *id certum est quod certum reddi potest* (that which can be made certain, is certain). Thus, a contract to sell all the straw one has to spare, not exceeding three tons, is not void for uncertainty, as the quantity to be sold can be determined.[10] But where A agreed to work for B for such remuneration as B deemed right, the court refused to enforce the contract because of its indefiniteness.[11]

70. **Mutuality of obligation.**—There are many agreements in which one party has become bound but the other has not. Such engagements lack what is called mutuality, more properly termed mutuality of obligation.[12] In such a case there is an unenforcible agreement. Thus, where an apprentice agreed to

[7] Dusenbury v. Hoyt, 53 N. Y. 521.

[8] Kent v. Rand, 64 N. H. 45.

[9] See state statutes.

[10] White v. Hermann, 51 Ill. 243.

[11] Taylor v. Brewer, 1 M. & S. 290 (Eng.).

[12] To distinguish from mutuality of remedy, a question for equity jurisprudence. See subject, EQUITY.

remain a certain length of time, but the master did not promise to instruct him, the agreement lacked mutuality.

The most frequent example of a want of mutuality is the case where A promises to sell B such goods as he may "desire" or "wish" during a certain period of time. Here, B has bound himself to nothing, for he is not required to desire any goods; whereas, if he does desire some goods, A should furnish them. There is therefore no consideration, for B has incurred no legal liability. Consequently, it is said that an enforcible contract requires mutuality of obligation.[13]

The correct view is that there is no agreement, but simply an offer which may be accepted by giving an order until such time as the offer is actually withdrawn or until it expires by lapse of time.

On the other hand, where A's offer is to supply B with all the coal he may "require" or "need" during a certain period of time, B is bound to the extent of having to purchase such coal from A. It may be that he will purchase no coal, but if he purchases any, it must be from A. Otherwise, he will be liable to A in an action on the contract.[14] In short, where B agreed to purchase what he "desired," he might purchase from another than A; where he agreed to purchase what he "needed," he bound himself to purchase from A.

An option contract whereby, for example, A, for a consideration of $1, agrees to keep open for ten days

[13] Minn. Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774; Joliet Bottling Co. v. Joliet Citizens Brewing Co., 254 Ill. 215, 98 N. E. 263, LEADING ILLUSTRATIVE CASES.

[14] Nat'l Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427.

an offer to sell B his house, binds A to sell the house if B accepts, but does not bind B to purchase. Such options are enforcible in law courts, and where there is a consideration, equity will usually grant specific performance. But in some cases it is said the option lacks mutuality. As a matter of reasoning, however, the option is a contract to keep an offer open in consideration of $1. This, in fact, is the situation in any unilateral contract, wherein the consideration is executed on one side. B has performed his part of the agreement by paying the dollar. A is to perform by keeping the offer open. Thus there is mutuality, for both have bound themselves. Courts sometimes confuse the option with the contract which is made when the offer, kept open by the option, is accepted and a contract for the sale of land is created. Then there is a promise to buy and one to sell. This second contract also possesses mutuality of obligation.[15]

71. **Forbearance to sue.**—The promise not to press or to bring suit on a claim may constitute a sufficient consideration. Such cases are generally divisible into one of three classes:

(1) *Where the claim is well founded.* In this event, the promise to forbear is a sufficient consideration to support a contract. In fact, the early English cases and a few American states recognized no other forbearance as a consideration. This situation constitutes a consideration in all jurisdictions.[16]

(2) *Where the claim is doubtful.* If the claim is doubtful, either in law or in fact, forbearance to press

[15] See 2 Illinois Law Review 463.

[16] Harris v. Cassady, 107 Ind. 158, 8 N. E. 29.

that claim is a sufficient consideration in most jurisdictions. Up to the time of an actual decision by the court as to the validity of the claim, forbearance is a consideration. But after a decision has been rendered whereby B must pay A, then a promise by B to pay A if he will not press the judgment is not a consideration, because B is promising to do what he is legally bound to do, namely, to pay.[17]

In the case of Alliance Bank v. Broom,[18] A was pressing B for the payment of a claim which was due. B offered A certain securities if he would not sue on the claim. Later, A sued B on this promise. It was held that as A did actually forbear suit in reliance upon B's promise to furnish the securities, he could recover. Although A need not have sued, yet his forbearance did constitute a consideration.

(3) *Where the claim is unfounded.* If the claim is not only doubtful, but without foundation, two situations arise. If A knows that his claim is without foundation, his forbearance is not a consideration. But if he believes that he has an enforcible claim, and this belief is reasonable, the forbearance is a consideration. This case approaches that of (2) above. If his belief, although honest, is unreasonable as to the validity of his claim, the forbearance is probably not a consideration.[19]

The waiver of a right or forbearance to sue a third person is a valid consideration for the promise of the promisor. A's agreement not to sue B is a considera-

[17] Simmons v. American Legion of Honor, 178 N. Y. 263.

[18] 2 Drew & S. 289 (Eng.).

[19] Anson, Contracts (Huffcut's 2d ed.), § 131; Pennsylvania Coal Co. v. Blake, 85 N. Y. 226, LEADING ILLUSTRATIVE CASES.

tion for C's promise to pay B's debt to A.[20] Mere forbearance to sue without any promise to forbear is not always a consideration. Especially is this true where it is clear that the parties intended that a promise be made. In Strong v. Sheffield,[21] A promised that if B would guarantee C's debt to him, he would not sue until he needed the money. The fact that A had in fact forborne in reliance on the promise, did not constitute a consideration. He should have given the promise, as intended.

Mutual promises to forbear are always sufficient to support each other.[22] Moreover, it is no objection to the validity of the agreement that no particular time was specified as the period for forbearance. This will be held to be a reasonable time.

72. **Compromise.**—A common form in which a forbearance appears as the consideration for a promise is in the settlement or compromise of a disputed claim. Where A claims that B owes him sixty dollars for groceries, and B claims it is fifty dollars, both being sincere in their dispute, A's promise to compromise for fifty-five dollars is a consideration for the contract to forbear to sue. But to forbear to do what one may not legally do, as to agree not to sue on a gambling debt in return for B's promise to pay, is not a consideration.[23]

In respect to compromises, the rule is general that the promisee must in any event believe in his claim. But, as indicated in the section on forbearance, not

[20] Howe v. Taggart, 133 Mass. 284.
[21] 144 N. Y. 392.
[22] Howe v. Taggart, 133 Mass. 284.
[23] Everingham v. Meighan, 55 Wis. 354, 13 N. W. 269.

every sincere claim will support a consideration. In Gunning v. Royal,[24] A engaged from B a horse and a driver who was B's employee. The driver was incompetent, and as a result of his negligence the horse was killed. But B demanded that A pay for the horse. A actually gave a note to settle the claim. When he was sued on the note, he defended on the ground that there was no consideration for his promise to pay an unfounded claim. The court held with him. The loss being due to B's own servant, and the claim therefore being of no validity, the mere existence of the dispute was not permitted to be a consideration for the settlement.

Where a claim is well founded, a compromise constitutes a consideration. Suppose that A is injured by B's automobile, which at the time of the accident, and as a cause of the accident, was exceeding the speed limit, as provided by the state laws. Assume that the statute involved provided that excessive speed made a prima facie case of negligence. A promise by A to forbear suit, and to give a complete release for his injuries for the sum of one thousand dollars, would constitute a sufficient consideration to uphold the compromise agreement. Similarly, if the claim is doubtful, as in the case of a forbearance, the compromise will be supported by a sufficient consideration; thus, where A, a brakeman, is injured by B, a laborer, who is unloading a car on a different train, it is not certain whether or not A and B are fellow servants, and whether the railroad company is liable to A. A compromise by which the railroad

[24] 59 Miss. 45.

company pays A a sum for a release would be supported by the consideration paid, although the claim is doubtful, for both the company and A are doing what they need not do: the one to pay, the other to release.

Payment of a less sum. A promise to pay, or a payment of less than the whole amount of a certain sum due, which is *not* disputed, is not a sufficient consideration to discharge the debt. For instance, if A agrees to release B from a judgment entered for $100 if B pays $75, B is promising to do what he is bound to do. Wherefore, although B pays A $75, A may nevertheless recover the additional $25 in a later action.[25] Similarly, a payment of a less amount is no consideration for an extension of time in which to pay the balance.[26] Something different must be given, as a "horse, a hawk or a robe."[27]

This rule is limited to its precise import, and every opportunity is taken to avoid it. Thus, if the payment of the less sum is made before the debt is due, that will constitute a consideration for a release of the debt. If A agrees to pay at a place other than the one stipulated, he promises to do that which he is not bound to do, and a consideration arises therefrom.[28]

Thus, in the case where a contract has been broken, and A promises to forego the right of action arising from the breach, this will constitute a consideration

[25] Williams v. Carrington, 1 Hilton 515 (N. Y. C. P.), LEADING ILLUSTRATIVE CASES.

[26] Day v. Gardner, 42 N. J. Eq. 199.

[27] Anson, Contracts (Huffcut's 2d ed.), § 140.

[28] Jaffray v. Davis, 124 N. Y. 164.

for a compromise of the breach. Two situations may arise. On the one hand, if the right to damages is not disputed, the amount may or may not be certain. If certain, then the consideration must be something other than money, for A is admitting his debt. But if the amount is unliquidated, the payment of a certain sum will be a consideration for the compromise. On the other hand, if the right is uncertain, the suit may also be compromised and there will be a consideration.[29]

The practice in discounting liquidated and ascertained debts is to execute a contract wherein it is recited that "in consideration of the dispute between A and B with reference to the sum due from B to A, the parties agree in compromise thereof that B shall pay A the sum of ten dollars in full settlement of his claim." Thus, although there is no question but that B owes A fifteen dollars, the above writing is entered into in order to set up an apparent defense, should A attempt to avail himself of the rule that the payment of a less sum is not a consideration for the release of the whole sum admitted to be due. In that manner, the burden is thrown on A to show that there was no dispute.

73. **Accord and satisfaction.**—Whether the sum due is certain or uncertain, the consideration for the promise to forego the residue of the debt must be executed. It is not enough that the parties have agreed to forego. To bar any rights on the original cause of action, the agreement must have been performed before any action is brought. If it has been

[29] Fuller v. Kemp, 138 N. Y. 231.

carried out, there are an accord and satisfaction. If the agreement has not been performed, there is an accord. This, as explained, is an executory contract for the doing of that which if done is to be accepted as satisfaction of the original cause of action.[30] An accord alone is not a bar. There must be accord and satisfaction.

74. **Legal duties as consideration.**—Where a party is under a duty imposed by law, a promise to perform that duty cannot be a consideration. If a police officer does something in the general line of his work, as to arrest a criminal, he may not recover on a reward offered for such arrest. The policeman is doing what he is bound to do.[31]

But where A offered $1000 to anyone who would bring his wife's body out of a burning hotel, B, a fireman, entered the building and carried out the body. A refused, upon demand, to pay the reward. B was permitted to recover the $1000 in an action on contract. The court held that it was not a part of his duties to risk his life for such a purpose. Therefore, his act was a consideration for the promise.[32]

Similar duties, which a promise to perform would not constitute a consideration, exist in the wife's promise to perform her marital duties; the ward's promise to obey his guardian; and the promise of a mother to support her illegitimate child.[33]

[30] Lynn v. Bruce, 2 H. Bl. 317 (Eng.).

[31] Pool v. Boston, 5 Cush. 219 (Mass.); Smith v. Whildin, 10 Penn. St. 39, LEADING ILLUSTRATIVE CASES.

[32] Reif v. Paige, 55 Wis. 496; see Harris v. More, 70 Calif. 502. Compare with § 15, as to the intent to make a serious offer.

[33] See cases collected in 9 Cyclopedia Law & Procedure, 348.

75. Contractual obligations as consideration.— The promise to perform an existing contract is not a consideration. There is no legal detriment, and the promisor agrees to do what he is bound to do by virtue of the existing contract.[34] This is the weight of American authority.

A different case is said to arise where A abandons a contract, because, for instance, he is losing money on its performance. B then promises to pay A an extra sum if he will perform the contract. It would seem that when A performs, he is only doing what he is bound to do under the first contract, and that his promise to perform is no consideration. But some courts hold that since A can actually abandon the contract, and not perform (although he is liable in damages), to give up this power to abandon is a consideration for a promise for extra compensation.[35]

In Bowman v. Wright,[36] a tenant was about to abandon certain premises which he held under a lease. He expected to pay rent, however, for the unexpired term. In order to save his insurance policy, because of a provision limiting liability in case the premises were vacated, the landlord agreed to lower the rent if the tenant would remain in occupancy. It was held that, although the lease called for a higher rent, this promise to remain (an act the tenant was not bound to do) was a consideration for the lower rent.

In personal service contracts, to constitute a new consideration for another agreement, there must also

[34] Phoenix Ins. Co. v. Rink, 110 Ill. 538.
[35] King v. Ry., 61 Minn. 482.
[36] 65 Nebr. 661.

be some act which B is not bound to do by virtue of his contract. Where a seaman was promised extra wages to remain with a ship, which part of the crew deserted, he could not recover for the extra compensation, because it was his duty under the original contract to assist in working the vessel home.[37] But had he agreed to do something in addition to his original contract, he could have recovered. Thus, in Turner v. Owen,[38] the master offered the crew additional wages to remain on an unseaworthy vessel. This, the court held, they were not bound to do under their contract for service, and the plaintiff was thereby permitted to recover. The consideration was sufficient.

76. **Promises to third persons.**—There is a division of the authorities as to whether or not a promise by a party of a contract to a third person to perform the contract is a consideration for the promise of the third person. Where A agrees with C, for the sum of $100, to perform his abandoned contract with B, there is said to be a consideration. Although A is bound by a contract with B, and a promise to B to perform would not be a consideration, yet where A promises C to do something he is not bound to do by any obligation to C (although it be an obligation to B), there may be a consideration.[39]

In Shadwell v. Shadwell,[40] A wrote to C, his uncle, announcing his engagement to B. C wrote: "As I promised you I will pay you £500 a year until your

[37] Stilk v. Myrick, 2 Camp. 317 (Eng.).
[38] 3 F. & F. 176 (Eng.).
[39] See 12 Harvard Law Review 520.
[40] 30 L. J. C. P. 145 (Can.).

income as a chancery solicitor reaches that sum." After A married he sued C on the annuity promise. He was permitted to recover, although he had merely carried out the contract of marriage he had previously made with B.

77. **Mutual promises.**—It is said that mutual promises constitute a consideration for each other. This is true in so far as the promises, if carried out, will result in a legal detriment. If A promises B $250, if B will promise to release his entire claim of $275, there is an exchange of promises, but the agreement is not binding, since A's promise when completed would merely be an act which he was already bound to perform. But if A promised to deliver B a table in return for B's promise of a release, there would be a consideration, for in the delivery of the table A is promising to do what he is not bound to do. This is a legal detriment.

78. **Compositions with creditors.**—An exception to the rule that all contracts must be supported by a consideration exists in the agreement of a debtor, who is in financial difficulty, to pay his creditors less than the full sum due in full satisfaction of their claims. The general rule, it will be remembered, would not regard a promise to accept less than the whole sum as a consideration, because the debtor promises to do what he is already bound to do—namely, to pay. But in the case of a composition with creditors, the agreement of all of the creditors to accept less than the full amount of the debts, and the promise to pay by the debtor, are said to constitute a contract. This view is based on the theory

that the consideration is the undertaking by the debtor to obtain the consent of all of the creditors to the composition. Some courts regard the mutual agreements of the creditors with each other for the benefit of the debtor as the consideration.[41] Bankruptcy act discharges are based upon the express provisions of law, and not upon contract; hence, the question of consideration is not involved.

79. **Present and past considerations.**—The consideration must be present. It must be some detriment to the promisee at the time of and in exchange for the promise of the promisor. Something done or given or forborne in the past will not suffice. The law declares that a past consideration will not support a promise.[42]

"A past consideration is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If afterwards, whether from good feeling or interested motives, he makes a promise to the person by whose act or forbearance he has benefited, and that promise is made upon no other consideration than the past benefit, it is gratuitous and cannot be enforced; it is based upon motive, and not upon consideration."[43]

In Roscorla v. Thomas,[44] A contracted to sell B a horse. Later, B refused to accept the horse unless A warranted its age and disposition. A promised accordingly, and B sued upon that promise. There

[41] Anson, Contracts (Huffcut's 2d ed.), p. 120, note.

[42] Anson, Contracts (Huffcut's 2d ed.), § 148; Osier v. Hobbs, 33 Ark. 215; Ludlow v. Hardy, 38 Mich. 690.

[43] Mills v. Wyman, 3 Pick. 207 (Mass.), LEADING ILLUSTRATIVE CASES.

[44] 3 Q. B. 234 (Eng.).

could be no recovery, for there was no consideration for A's promise. The purchase price could not serve for the new promise, because it was previously given and only for A's promise to sell the horse.

To the general rule thus laid down, certain exceptions are said to exist. First, it is said that a past consideration will support a subsequent promise, if the consideration was given at the request of the promisor. This is really no exception. Such cases are those where a request is made which is in substance an offer of a promise upon terms to be afterwards ascertained. The services are rendered in pursuance of such request, and the subsequent promise to pay a fixed sum is really a part of the same transaction, or else evidence to the jury to determine what would be a reasonable sum. These cases usually indicate an original intention to pay. Thus, A, at B's request, made a journey to obtain a king's pardon for B. Later, B promised to pay a sum of money for these acts. A was permitted to recover. This case is explained on the theory that inasmuch as B requested A to perform services for him under circumstances that indicated an intention on his part to pay, an action would lie, regardless of the express promise, on an implied in fact contract.[45] Often the situation will give rise to a quasi-contract action.[46]

The second alleged exception is said to exist where a person has voluntarily done what another was legally bound to do. This, although a past con-

[45] Lampleigh v. Brathwait, Hobart 105 (K. B., Eng.); Kennedy v. Broun, 13 C. B. (N. S.) 677 (Eng.).

[46] See subject, QUASI-CONTRACTS.

sideration, is sufficient to uphold an express promise to recompense such voluntary act. This exception is said to be founded upon the rule that a subsequent ratification of a voluntary act amounts to a previous authority.[47] Anson concludes, however, that the authorities usually cited for this rule fail to support it.[48] There is considerable doubt as to the foundation for the rule, unless there is a preëxisting quasi-contractual obligation as in the first exception above.

The third alleged exception consists in the rule "that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it."[49] Illustrations of this exception are the ratification of voidable contracts by an infant upon his attainment of majority,[50] the subsequent promise made by a bankrupt discharged from debts, to satisfy those debts,[51] and the promise to pay a debt which has been barred by the Statute of Limitations.[52] Each of these promises is really a present legal detriment, and a promise to do what one is not bound to do.

80. **Subscription agreements.**—Agreements of this kind are usually divided into those for chari-

[47] Gleason v. Dyke, 22 Pick. 390 (Mass.).
[48] Anson, Contracts (Huffcut's 2d ed.), § 150.
[49] Parke, B., in Earle v. Oliver, 2 Ex. 71 (Eng.).
[50] Reed v. Batchelder, 1 Met. 559 (Mass.). See § 95.
[51] Lawrence v. Harrington, 122 N. Y. 408.
[52] Keener v. Crull, 19 Ill. 189.

table purposes and those for business purposes.[53] Cases involving the latter rarely furnish a problem in the law of consideration, for there is usually a valuable consideration moving to the subscriber, and so the agreement is upheld.[54]

Charitable agreements furnish difficulties in the questions of consideration, and consequently of the enforcibility of the subscription contract. The decisions may be divided into three classes, for there is no uniformity by any means.

(a) If, on the faith of the subscription, the work for which the subscription was made has been done, as to secure additional subscriptions; or if liability has been incurred in regard to such work, as actually starting to build a church, there is a sufficient consideration.[55] But if no act be done or liability incurred on the faith of the subscription, it may be revoked, and it is revoked by the death of the subscriber.[56]

(b) Some jurisdictions hold that the promise of each subscriber is supported by the promises of the others.[57] Two difficulties arise in this theory: First, as the subscriptions were not all taken at the same time, it is difficult to see how the act of A in signing can be a consideration for B's promise who signs later. Again, the promises are made not to the church, for instance, but to the subscribers.

[53] Stovall v. McCutcheon, 107 Ky. 577; Martin v. Meles, 179 Mass. 114.
[54] Merchants Imp. Co. v. Exchange Bldg. Co., 210 Ill. 26.
[55] Beatty v Western College, 177 Ill. 280.
[56] Pratt v. Trustees, 93 Ill. 475.
[57] Higbert v. Indiana Ashbury University, 53 Ind. 326; Christian College v. Hendley, 49 Cal. 347.

(c) It is held in other jurisdictions that the acceptance of the subscription by the trustees of the charity implies a promise on their part to execute the work contemplated, and this supports the subscription.[58] In England, a charitable subscription is not binding.

In the presence of a strong moral influence, courts have thus constructed theories of consideration in these cases of subscriptions, which scarcely apply to ordinary contracts.

81. **Failure of consideration.**—Where the consideration is void only in part, but is entire in character and inseparable, then the whole contract fails. But where the consideration is separable, or where there are several considerations, and one is frivolous or fails, but is not illegal, the contract may stand because of the rest, so long as the remaining considerations are sufficient.

If any part of a consideration, whether entire or separate, be illegal, the promise will fail because it is against public policy to enforce a promise obtained by an illegal act. Thus where a promissory note was given in payment of an account, some of whose items were for groceries, and others for liquors sold in violation of the statute, it was held that the note was void entirely.[59]

In Jamieson v. Renwick,[60] A agreed to pay B a certain sum every year, provided B would not reside in the town of S, or visit or annoy A, or claim any

[58] Martin v. Meles, 179 Mass. 114.
[59] Widoe v. Webb, 20 Ohio St. 431.
[60] 17 Vict. L. R. 124 (Victoria).

interest in A's land. The promise not to annoy is not a consideration, for B has no right to annoy A, but the other promises are considerations, for B gives up his right to live in S and to claim A's land. These considerations will support the contract.

If only a part of the consideration fails, and it does not go to the essence of the contract, the partial failure will not avoid the contract. Thus, in Palmer v. Meriden Britannia Co.,[61] by the provisions of a lease A was required to do certain building on the land, and was to pay $1000 rent per year for ten years. At the end of the period A was to receive $5000. B refused to pay because the cement furnished was not as specified. The court held that this failure of consideration did not go to the essence of the contract. It could be compensated for by an amount to be deducted from the $5000, but the whole contract could not be avoided by this breach. Some contracts are by their nature and intent not to be avoided by reason of a slight or immaterial variation or failure in the consideration, as in the sale of lands where a definite number of acres are called for, followed by the words "more or less."

But if the consideration wholly fails the contract is unenforcible. If A sells B a business for $1000, and he has no business to sell, naturally A may not maintain an action against B.

82. **Presumption of consideration.**—Bills of exchange, promissory notes and negotiable instruments are by the law merchant deemed to have been issued for a valuable consideration. That is to say, the pre-

[61] 188 Ill. 508.

sumption is that there is a consideration, and it is necessary to show that there is none.[62] Similarly, some state statutes have provided that all written instruments shall be presumptive evidence of a consideration.[63]

[62] See subject, NEGOTIABLE INSTRUMENTS.
[63] Statutes in California, Indiana, Iowa, Kansas.

CHAPTER VI.

STATUTE OF FRAUDS AND PERJURIES.

83. **Provisions of fourth section of Statute of Frauds.**—The Statute of Frauds and Perjuries was passed in the twenty-ninth year of the reign of Charles II, A. D. 1677. Among other remedies, it was aimed to prevent the perpetration of fraud and the temptation to commit perjury in testifying as to the making of contracts. The fourth section of that Statute has been substantially adopted in practically all of the United States. The seventeenth section relating to the sales of goods has not been so widely copied.

The provisions of the fourth section are as follows:

"No action shall be brought

(1) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate;

(2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person;

(3) or to charge any person upon any agreement made in consideration of marriage;

(4) or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them;

(5) or upon any agreement that is not to be performed within the space of one year from the making thereof;

unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."[64]

84. **Construction of the fourth section of the Statute of Frauds.**—The operation of the Statute of Frauds upon a contract within its terms is to prevent the enforcement of that contract unless the requirements of the Statute are satisfied. Some authorities regard the Statute as prescribing a rule of evidence. That is to say, the contract may not be proved because it does not satisfy the Statute.[65] This principle is supported by the rule that unless the Statute of Frauds is specially pleaded, the oral contract may be proved.[66] In short, there is a contract, but no action may be brought upon it because, the Statute being pleaded, there is no writing to prove the contract. Where, however, the Statute provides that the contract shall be void instead of providing merely that no action shall be brought upon it, the contract may never be proved, for it is void.

Compliance with the form required by the Statute of Frauds does not constitute the contract. The Statute always presupposes an existing lawful contract. If there is no contract, the question of the

[64] St. 29 Car. II., c. 3.

[65] Browne, Statute of Frauds (5th ed.), § 115a.

[66] Anson, Contracts (Huffcut's 2d ed.), § 107, note.

necessity for a writing does not enter the problem.[67] It is evident, therefore, that the Statute of Frauds affects only the remedy that may be brought on a contract, and not its inherent validity.[68]

85. **Nature of the contracts in the fourth section —Clause (1) Executor.**—An executor or administrator of a deceased person's estate is not bound by his promise to pay out his own money for that estate unless his promise is in writing. These promises appear to be a part of that body of contracts known as guaranties, and are more fully discussed in the next section. "There would be no distinction between them, but for the circumstance that the executor or administrator, being the legal representative of the party originally liable, is already, in that capacity, under a liability to pay to the extent of the property which comes to his hands. The Statute, therefore, is confined to his special promise to pay out of his own estate."[69]

86. **Same subject—Clause (2) Any special promise to answer for the debt, default or miscarriage of another person.**—This is a promise of guaranty or suretyship. "Deal with X, and if he does not pay you, I will," indicates the agreement.[70] X is the person primarily liable and I am secondarily liable. My promise in such a case must be in writing, before an action may be maintained against me.

[67] Leroux v. Brown, 12 C. B. 801 (Eng.); Pritchard v. Norton, 106 U. S. 124; Crane v. Powell, 139 N. Y. 379.

[68] Anson, Contracts (Huffcut's 2d ed.), § 108, note. See § 10 on use of void, voidable and unenforcible.

[69] Browne, Statute of Frauds (5th ed.), § 153; McKeany v. Black, 117 Cal. 587.

[70] Mallory v. Gillett, 21 N. Y. 412.

It is not always easy to determine what promises are within the Statute, and a few general propositions should be carefully observed.[71]

An indemnity is not in the Statute and need not be in writing, for in such a case one party is primarily liable whether or not the other party makes a default.[72] It is an original promise and depends on no other. Similarly, where A owes B a sum of money, and he is about to be sued for the debt, a promise by C to pay B if he will not sue A is not within the Statute, for there is a new contract whereby, for the consideration of B's promise not to sue, C agrees to pay. C's promise need not be in writing, for he has created for himself an original liability and he is liable in every event to B. His promise is not collateral to any primary liability. It is the collateral promise that falls within the scope of the Statute of Frauds.[73]

Where a promise is original, it need not be in writing; where collateral, it must be in writing in order to maintain an action thereon. Thus guaranties, which must be in writing, require at least three parties, and have a primary or original liability for which the third party promises to answer. When A and B go into a store and A says to the storekeeper, "Sell B these goods; if he does not pay you, I will," the primary liability is on B to pay for the goods. A's promise, on the other hand, is collateral or secondary to B's liability and so must be in writing.

[71] See May v. Williams, 61 Miss. 125, LEADING ILLUSTRATIVE CASES.
[72] Anson, Contracts (Huffcut's 2d ed.), § 97.
[73] Meyer v. Hartman, 72 Ill. 442.

But if A should say, "Let B have the goods, I will see you paid," A's promise is original, for there is no liability of B to which A's promise can be collateral. This original promise of A need not be in writing.[74]

If A says to X, "Give M a receipt in full for his debt to you, and I will pay the amount," this original promise would not fall within the Statute.[75]

87. **Same subject—Clause (3)—Marriage.**—This section has been most frequently applied to marriage settlements.[76] It would seem that the Statute extends to any agreement to undertake any duty or office in consideration of another's contracting a marriage, whether with the promisor or with a third person.[77] But mutual promises to marry are not covered by the Statute and need not be in writing, unless they are not to be performed within a year.[78] A distinction should be noted between agreements in consideration of marriage and agreements which are merely in expectation or contemplation of marriage. It is the former only which require a writing.[79]

88. **Same subject—Clause (4)—Contract or sale of lands.**—This section deals with the agreements to sell land and with the sale of lands. "Lands, tenements, or hereditaments, or any interest in or concerning them" is the wording of the clause. Such interests include both legal and equitable interests.

[74] Birkmyr v. Darnell, 1 Sm. L. C. 289 (Eng.).

[75] Goodman v. Chase, 1 B. & A. 297 (Eng.). This section is treated more fully in the subject of SURETYSHIP.

[76] 6 Illinois Law Review 503.

[77] Brenner v. Brenner, 48 Ind. 262.

[78] Hunt v. Hunt, 171 N. Y. 396; see § 89.

[79] Riley v. Riley, 25 Conn. 154; Browne, Statute of Frauds (5th ed.), § 215b.

Thus, an agreement to cancel a written contract for the sale of land must be in writing to give it effect, because the contract for the sale gave an equitable interest, by the rules of equity, to one party, which interest, by the cancellation, is transferred back to the first party.[80]

The Statute extends to dower, rents and the assignments of leases.[81] The interest in the land, however, must be a substantial interest, and not merely arrangements preliminary to the acquisition of interest, for example, the contract for an abstract of title.[82] Such contracts require no writing.

Interesting questions arise in the determination of the necessity for writings for contracts referring to crops, trees, etc. Such products are divided into two classes. One is termed "fructus industriales" (products of cultivation), and the other is called "fructus naturales" (products of nature). The first class includes those crops, such as grain, corn, and wheat, which are produced by man to be severed. They are not considered as interests in land, but as personalty or chattels, and any contract relating to them need not be in writing because of the provisions of the fourth section of the Statute of Frauds. They may, however, fall under the provisions of the seventeenth section with reference to the sale of goods.[83] The second class is interests in land, and includes

[80] Hughes v. Moore, 7 Cranch 176 (U. S.); Browne, Statute of Frauds (5th ed.), § 229.

[81] Lenfers v. Henke, 73 Ill. 405; Brown v. Brown, 33 N. J. Eq. 650.

[82] Heyn v. Philips, 37 Cal. 529.

[83] Browne, Statute of Frauds (5th ed.), § 236; see subject, SALES; see § 92.

things such as trees and timber. These articles are planted for a permanent purpose and a contract for their sale must be in writing in order to satisfy the fourth section. But if the contract is to sever trees and to sell, they become chattels and the agreement need not be in writing.[84]

In general, there are four kinds of contracts concerning interests in land. First, there may be a contract merely to sell land. This agreement must be in writing.[85] Second, the contract may be one to sever and sell. That is, A contracts with B to sever timber and to sell it to B. This is not in the fourth section, for the timber is then regarded as chattel property, and not as realty.[86] Third, a contract giving the vendee possession to sever the timber would be in the Statute, for the vendee would acquire an interest in the land, namely, possession. Fourth, the contract may give a license to enter and cut, but not possession. This contract would not be in the Statute.[87]

In boundary line cases, the rules may be well illustrated. Suppose that the line between two adjoining pieces of property, called X and Y, is uncertain and that the parties orally agree to make the boundary a certain line. This contract is not in the Statute, for no interest in land is transferred. The boundary is merely ascertained and made definite. No one can say whether the owner of X receives a part of Y, or

[84] See subjects, REAL PROPERTY, SALES.

[85] Hirth v. Graham, 50 Ohio St. 57, LEADING ILLUSTRATIVE CASES; Lavery v. Purssell, 39 Ch. Div. 508 (Eng.).

[86] Long v. White, 42 Ohio St. 59.

[87] City of Berwyn v. Berglund, 99 N. E. 705 (Ill.), LEADING ILLUSTRATIVE CASES.

vice versa.[88] But suppose that the dividing line is definite, but the parties agree to make a creek instead of the former line as the boundary. This creek winds about the former line. Such a contract must be in writing, for it transfers interests in land. In some places the owner of X would acquire what had belonged to the owner of Y, and the owner of Y would acquire land that had belonged under the old boundary arrangement to the owner of X.[89]

89. **Same subject—Clause (5)—Agreement not to be performed within the space of one year from the making thereof.**—A contract does not fall under this section of the Statute unless it cannot possibly be performed within a year. The fact that it may not be performed is not enough to require the contract to be in writing, so long as it might be performed within a year.[90]

In a railroad case,[91] the company agreed orally to place and maintain as long as needed a switch opposite A's mill, if he would furnish the ties and grade the ground. The company failed to perform its agreement, and A sued on the contract. The Statute of Frauds was pleaded as a defense. The court held that the oral contract did not fall under the fifth clause of the section because the contract could be performed within a year. It is of no importance that the time is uncertain. But if the agreement had been by express terms to maintain the switch beyond one year, the statute would have applied.

[88] Cavanaugh v. Jackson, 91 Cal. 580.
[89] Nathan v. Diersson, 134 Cal. 282.
[90] Anson, Contracts (Huffcut's 2d ed.), § 100.
[91] Warner v. Texas, etc., Ry., 164 U. S. 418.

If the contract depends on a contingency, the question which arises is when can that contingency happen. Thus, where A agrees to maintain a child during life, the oral contract is not within the statute, for the child may die within a year, and the contract would thereby have been performed.[92] Similarly, a promise by A not to go into a certain business for five years is not in the Statute because A may die within a year. Thereby, the terms of the oral agreement would be fulfilled within the year.[93] But where A orally engages the services of B for three years, although B may die within a year, yet the contract is not performed. A would not have the services of B for three years. Hence, such a contract cannot be performed within a year. It must, therefore, be in writing. Likewise, mutual promises to marry, if not to be performed within a year, must be in writing.[94]

90. **Executed contracts—Part performance.**—If an oral contract has been completely executed on both sides, the rights, duties and obligations of the parties resulting from such performance stand unaffected by the Statute.[95] It is the executory contract which falls within the Statute of Frauds, never the executed contract.[96]

If a contract has not been completely executed on both sides, but only one side has performed, either in

[92] Souch v. Strawbridge, 2 C. B. 808 (Eng.); Carr v. McCarthy, 70 Mich. 258.

[93] Doyle v. Dixon, 97 Mass. 208.

[94] Ullman v. Meyer, 10 Fed. 241; Browne, Statute of Frauds (5th ed.), § 272.

[95] Bibb v. Allen, 149 U. S. 481; Stone v. Dennison, 13 Pick. 1 (Mass.).

[96] Browne, Statute of Frauds (5th ed.), § 116.

whole or in part, the contract falls within the requirements of the Statute if the action is at law. But if the Statute is concerned in an oral contract in a proceeding in equity, a different rule is sometimes followed. Generally, that rule is applied only to oral land contracts. For instance, if, in reliance upon an oral contract to sell him a tract of land, A builds a house on the land and pays B the purchase price, a court of equity would not permit B to set up the Statute of Frauds as a defense, but would compel B to deed the land to A.[97] But not every part performance will take a contract out of the Statute even in equity. For further discussion of the rights in equity, the reader will consult the article on Equity.[98]

If there has been part performance, and the other side refuses to perform, the party who has partly performed has an action in quasi-contract to recover for the services he may have rendered, the materials furnished, or the purchase price paid, as the case may be.[99]

Should A, however, who has paid the purchase price under an oral contract, attempt to recover the same, when B is willing to perform, the Statute will not enter into the question, and A cannot recover. In short, as B in such a case would be the party to be charged, A having performed, the Statute would not apply, for it is only the party who is to be charged who may set up the Statute of Frauds as a defense.

[97] Leavitt v. Stern, 159 Ill. 526; Browne, Statute of Frauds (5th ed.), § 447.

[98] See Glass v. Hulbert, 102 Mass. 24; Anderson v. Manners, 243 Ill. 405.

[99] See subject, QUASI-CONTRACTS; Richards v. Allen, 17 Me. 296.

A could not sue even in quasi-contract to recover the purchase price. He must permit the performance of the contract or lose.[1]

The same rule applies to personal service contracts. If A orally agrees to work two years for B, and voluntarily quits after six months, he may not recover for services rendered, so long as he has no excuse for stopping and so long as B is ready to have him work.[2]

91. **Provisions of the seventeenth section.**—The seventeenth section of the Statute of Frauds relates to the sale of goods. It has been copied substantially into the statute law of most of the states. Instead of "10 pounds sterling," the amount is usually "$50 or upwards."

The provisions of this section are as follows: "That no contract for the sale of any goods, wares, and merchandise for the price of 10 pounds sterling or upwards shall be allowed to be good, except:

(1) the buyer shall accept part of the goods so sold and actually receive the same;

(2) or give something in earnest to bind the bargain, or in part of payment;

(3) or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto authorized."[3]

92. **Construction of the seventeenth section.**—There are, therefore, three methods to enforce a

[1] Thomas v. Brown, L. R. 1 Q. B. 714 (Eng.).

[2] Philbrook v. Belknap, 6 Vt. 383.

[3] See subject, SALES; Bird v. Munroe, 66 Me. 337, LEADING ILLUSTRATIVE CASES.

contract for the sale of goods in order to take it out of the Statute. The first is to accept and receive a part of the goods; the second, to give part payment; and the third to write a memorandum.[4]

The greatest difficulty which arises under this section of the Statute is to determine what executory contracts for the sale of goods, wares or merchandise fall within its requirements. There are three lines of decisions called the English, the New York, and the Massachusetts rules, respectively.

English doctrine. This rule holds that all contracts which have as their purpose the sale of goods, whether those goods are made or in existence, or are to come into existence, fall within the scope of the Statute and must satisfy its requirements. This is the case even if the work and the labor in the making of the chattel are of the most importance.[5] Thus, a contract for the manufacture of a special kind of carriage would be within the terms of the Statute.

New York doctrine. This rule holds that only such contracts as are made for the sale of goods which are in existence when the contract is made are within the Statute.[6] Here, a contract to manufacture a special carriage would not be in the Statute.

Massachusetts doctrine. Here the rule is stated that "a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a con-

[4] Browne, Statute of Frauds (5th ed.), chap. XIV.

[5] Lee v. Griffin, 1 B. & S. 272 (Eng.); Brown v. Sanborn, 21 Minn. 402.

[6] Cooke v. Millard, 65 N. Y. 352; Parsons v. Loucks, 48 N. Y. 17; Meincke v. Falk, 55 Wis. 427.

tract for the sale of goods, to which the Statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the Statute."[7] Here, the special order would not be in the Statute. But an order to make a carriage usually manufactured would be in the Statute.

In England choses in action are not in the Statute. But it is generally held otherwise in the United States. Even the sale of stocks, promissory notes, bonds and the like are regarded as sales of goods, wares and merchandise and fall within the Statute.[8]

93. **Satisfaction of the requirements of the Statute of Frauds—Memorandum.**—To create a memorandum which will satisfy the Statute of Frauds, either for the fourth or the seventeenth section, and thus make the contract enforcible, the parties, the subject matter, and usually the consideration must appear.[9] If the writing is under seal, for the purposes of a court of law, the consideration need not appear.[10] Moreover, where the memorandum is of a contract for the sale of goods, the consideration need not appear.[11]

The memorandum must be signed by the party to be charged or his agent authorized to sign for him.

[7] Goddard v. Binney, 115 Mass. 450; see subject, SALES.

[8] Tisdale v. Harris, 20 Pick. 9 (Mass.); Greenwood v. Law, 55 N. J. L. 168.

[9] Grafton v. Cummings, 99 U. S. 100.

[10] This rule is further changed by statutes. In Illinois, for instance, the consideration need not appear in any case. Stimson, American Law, §§ 4140-4142.

[11] Wood v. Davis, 82 Ill. 311.

Furthermore, the subject matter should be so described in the memorandum that it can be identified. Parol evidence is admissible, however, to assist in determining what is meant by any particular expression in the description of the subject matter.[12]

A letter beginning with the word "Sir" and signed by the party to be charged but not containing the name of the person to whom it is addressed is not a sufficient memorandum for the purposes of the Statute. It fails to state the name of the other party to the contract. But if, for instance, the envelope in which the letter came can be produced and it contains the name of the other party, as addressee, the letter and the envelope will be regarded as one document, and thus the Statute would be satisfied with reference to the rule that the parties must appear in the memorandum.[13] This combination of papers is called "incorporation by reference." The memorandum may consist of various letters, papers and documents, but they must be connected and complete. Likewise, extrinsic evidence is admissible to explain what is there, but never to supply what is not present in the collected papers constituting the memorandum.[14]

The memorandum may be made at any time subsequent to the formation of the contract and before any action is brought.[15] One state, Illinois, seems to have held otherwise.[16]

[12] Anson, Contracts (Huffcut's 2d ed.), § 105.
[13] Pearce v. Gardner (1897), 1 Q. B. 688 (Eng.).
[14] Beckwith v. Talbot, 95 U. S. 289.
[15] Browne, Statute of Frauds (5th ed.), § 352a.
[16] Richardson v. Richardson, 148 Ill. 563.

As stated, the memorandum must be signed by the party to be charged or his duly authorized agent, but one party to the contract may not act as the agent of the other party for the purpose of signing.[17] Auctioneers and brokers, however, may be agents of both parties for this purpose.[18] The authority given to the agent to sign need not be in writing under the English Statute.[19] This rule has been changed in some states by legislation, which requires the authority of the agent to be in writing.[20] Moreover, the rule under the English Statute must be distinguished from the rule that to execute a deed under seal the authority of the agent to execute must be under seal and hence, in writing.[21] It is only the authority of the agent to sign the contract, and not the authority to convey, about which the Statute is concerned, and which, under the English Statute, need not be in writing.

The signature need not be an actual subscription of the party's name. It may be a mark, or be printed or stamped, if such mark or printing is intended as a signature. Furthermore, the signature may appear at any place on the memorandum.[22]

There are two lines of authorities with reference to the necessity for the delivery of the memorandum. One requires that there be a delivery; the other

[17] McElroy v. Seerey, 61 Md. 389.

[18] Wright v. Dannah, 2 Camp. 203 (Eng.).

[19] Horton v. McCarty, 53 Me. 394.

[20] Illinois.

[21] Statutory changes. Although substantially adopted by most jurisdictions, states have modified and amended the Statute of Frauds in different particulars. See also subject, AGENCY.

[22] Clason v. Bailey, 14 Johns. 484 (N. Y.).

takes the view that the literal requirements of the Statute are satisfied by the mere existence of the memorandum.[23]

[23] See 20 Cyclopedia Law & Procedure, p. 277.

CHAPTER VII.

CAPACITY OF PARTIES.

94. **In general.**—As contract results from agreement, and agreement requires two or more assenting minds, it follows that there must be at least two parties to every contract. The parties to a contract may be individuals, or aggregations of persons, as corporations, partnerships, and the like; they may act for themselves, or represent others as their agents, attorneys, servants and the like; and they may act jointly or severally.

For the purpose of the formation of a valid contract there must be parties capable of contracting, and it is the purpose of this chapter to indicate who are thus capable, and to find out who are incapable. All persons are presumed competent to contract, and disability, where it exists, must be set up when relied upon as a defense to a contract. Some persons, by the policy of the law, and for their own benefit, are incapacitated from binding themselves by contract. The incapacity may be entire or partial, and arises from a variety of causes, as infancy, coverture, imbecility, political status, and the like.

95. **Infancy.**—A person under the age of majority, which was twenty-one at common law, was regarded as an infant or a minor. Statutes frequently regulate this question, and have in many cases fixed the

age of eighteen as the majority of a woman. The common law did not as a rule regard fractions of a day and, therefore, an infant comes of age at the beginning of the day before his or her twenty-first or eighteenth birthday, as the case may be.[24]

Voidable contracts. In general, an infant's contracts are voidable. According to the early English common law, as well as a few American decisions, contracts of infants which were manifestly to their prejudice were declared void, and not merely voidable. An example is the case of a gratuitous conveyance of land by an infant. Such a grant was void. But this rule of interest became difficult to apply. Consequently, the general law declared that an infant's contracts are merely voidable. One exception continues to exist, however: an infant cannot appoint an agent or attorney. Such an appointment and all acts and contracts made by the alleged agent are void.[25] But the scope of this exception is narrowing to cases where the infant gives a warrant of attorney to confess judgment or to execute a deed.

The courts tend to leave the question to the infant himself to determine upon his coming of age whether he will abide by his agreement or not. At this time, he may ratify or repudiate the contract, as he thinks best. Necessarily, the other party to the contract may not repudiate it, but is bound if the infant desires to hold him to performance.

Valid contracts. Certain contracts are binding upon an infant, and he may not avoid them. Such

[24] Bardwell v. Purrington, 107 Mass. 419.
[25] Armitage v. Widoe, 36 Mich. 124.

are contracts authorized or required by law, and express and implied contracts for necessaries.

An infant's contract entered into under the authority of or by the direction of a statute or the common law, are binding upon him. Thus, where A, an infant, executes a bond to secure his appearance in a court in answer to a criminal charge, he is bound by the bond and may not avoid it because of his infancy. Similarly, because of the sovereign right and power of the state to enlist soldiers and sailors in its service, the enlistment contracts of minors are binding.[26] An infant is liable for contracts for necessaries. He is bound to pay the reasonable value of such necessaries, and generally may not be held on an express contract to pay more than such a reasonable value. Consequently, the basis of the obligation to pay for necessaries is not strictly contractual, but quasi-contractual in its nature.[27]

An infant is liable to pay for necessaries furnished him in order that he may obtain food, clothing, shelter, and education. Otherwise, if such obligations were voidable, tradesmen would not care to extend him credit. What are necessaries varies in different cases, and depends upon circumstances. The term includes whatever is reasonably needed for the subsistence, health, comfort, and education of the infant. These in turn depend upon his age and station in life. Necessarily, some things would never be necessaries. Thus, an airship would not be considered such, whereas a watch might be under certain circum-

[26] In re Morrissey, 137 U. S. 157.

[27] See subject, QUASI-CONTRACTS.

stances. Generally, the articles furnished must concern the person of the infant and not his estate. The articles must be for use and not merely for ornament. Thus, liquors, tobacco, and firearms are not necessaries. Furthermore, although an article be a necessity, it may not be extravagant in quantity or quality. Ordinary school books are necessaries, but a rare edition of Shakespeare's plays would not be. Nor is an infant liable where he is sufficiently supplied with articles and then purchases a larger supply. This is true even in the case of clothing. The person who deals with an infant acts at his peril.

An infant is not answerable for money borrowed, although it is expended by him for necessaries. Nor is he liable for money borrowed to buy necessaries, unless the lender sees that it is actually expended for necessaries.[28] In such event an action may be maintained against the infant.

Ratification and disaffirmance. If the contract is voidable, an infant may ratify it when he becomes of age. He is then bound and an action may be maintained against him on the contract. Ratification may be express and implied. If A, while under age, promises to sell his horse, he is bound by the agreement if, after he is of age, he expressly indicates his desire to perform. Similarly, if an infant accepts, after coming of age, the consideration of a contract made during infancy, his conduct will constitute an implied ratification.[29]

Disaffirmance is as necessary in some cases to pre-

[28] Randall v. Sweet, 1 Denio 460 (N. Y.).
[29] Boyden v. Boyden, 9 Met. 519 (Mass.).

vent an implied ratification as express ratification is necessary in other cases to make the contract binding. Thus, where an infant acquires an interest in permanent property, or enters into a contract which creates continuous rights, liabilities and benefits, he may become bound unless he expressly disaffirms. An infant who has purchased land and gone into possession will be held to have ratified the transaction if he does not disaffirm it within a reasonable time after coming of age. Similarly, an infant who leases property and continues to occupy the premises after attaining full age, is liable for arrears of rent which accrued during his minority. Moreover, where an infant has conveyed land, it is held that he can only defeat his grantee's title by a direct disaffirmance of the deed made, within a reasonable time after reaching his majority.

At one time it was necessary that the disaffirming act be of as high and solemn a character as the act disaffirmed. In modern law, the act need take no particular form or expression. An unequivocal intent to repudiate the binding force and effect of the contract as disclosed by acts and declarations is sufficient.

Necessarily, the ratification or disaffirmance must be of the entire contract. He cannot ratify as to part and repudiate as to the balance of the contract. Moreover, in the event of his disaffirmance, he must return any consideration which he has received.[30]

96. **Married women.**—At common law, except as to their equitable separate estate, married women were unable to make a valid contract either to bind

[30] Chandler v. Simmons, 97 Mass. 508; see subject, PERSONS.

themselves or to acquire rights thereby. This disability is now removed by statutes in the several states, and with a few exceptions married women may contract as though single.

97. **Persons mentally deficient.**—Idiots, lunatics and imbeciles cannot make binding contracts. This follows from the nature of a contract. Persons having no mind cannot contract, for an act of mind is required. But as there are many degrees of mental unsoundness, varying from mere weakness of intellect to entire incapacity, it is sometimes difficult to say just what cases are void for lack of mental capacity.

In general, to invalidate the contract there must be such a mental disability as from its character and intensity disables the person from understanding the nature and effect of his acts. So mere mental weakness or disability from old age, if not to the extent just stated, will not invalidate a contract entered into by a party so affected. And even an insane adult may become liable for necessaries.[31]

The insanity, to avoid the contract, must exist at the time of entering into it, and though the party afterwards recover his mind, he may repudiate a contract made while insane. Though the mental incapacity be caused by the party's own fault, as by his drunkenness, he may still avoid the contract unless his intoxication was part of a scheme to defraud.

A lunatic is a person once of sound mind, but who has lost his mental capacity through sickness or acci-

[31] Hovey v. Hobson, 53 Me. 451; Richardson v. Strong, 35 N. C. 106; see subjects, PERSONS, QUASI-CONTRACTS.

dent. He may avoid all his contracts save those bona fide made for necessaries. The term "necessaries" here means the same as in the case of infants; that is, all proper things as well as indispensables. His contracts, except those for necessaries, may be avoided by his guardian or other representative if he were actually insane at the time of making the contract, though he was seemingly sane and no unjust advantage was sought to be taken of him.

The law aims to protect insane persons or those mentally incapable of caring for themselves, but not those who are merely ignorant or careless. So one who, lacking ordinary intelligence or shrewdness, makes a bad or foolish bargain, may not avoid it on the ground of his incapacity.[32]

Persons incapable by reason of extreme prodigality to preserve their property may be put under guardianship, and thus lose the right to make contracts. These are called spendthrifts. The same is true of habitual drunkards.

Seamen are protected by law from their own carelessness both as regards their person and rights. The United States Revised Statutes contain many provisions for their protection and benefit. And an agreement by a seaman to shipping articles which do not contain the general rights and privileges prescribed for such articles is void.

98. **Aliens.**—An alien is a person born out of the jurisdiction of a country in which he lives, and not naturalized therein. By a rule of law and construction the children of ambassadors, ministers, etc.,

[32] Clark, Contracts (2d ed.), § 117.

though born out of the jurisdiction of their country, are yet citizens. Furthermore, children born to citizens while temporarily sojourning in a foreign country are citizens of their parents' country, but they may elect to become citizens of the country where born.

Aliens at common law could not hold real property, and their right to personal property was precarious. The rights of aliens to hold real property are regulated by the statutes of the several states, and, with a few exceptions, where they have been limited as to the amount they might acquire in each county, they have the same right to acquire and hold property as citizens. The Congress of the United States has the power to confiscate the goods and properties of alien enemies, and in time of war may give the subjects of the power with whom the United States is at war a stated time to remove from our territory. Until so ordered out, aliens may sue and be sued in our courts, both in peace and war; but they must obey the laws and are amenable to all laws of the jurisdiction in which they live.[33]

During the war of the rebellion, the inhabitants of the Northern and Southern states were enemies, and all contracts made between them during the continuance of hostilities were void.[34] Contracts existing before the war were not ended or void, but the remedy was suspended until peace was restored.[35]

[33] Clarke v. Morey, 10 Johns. 68 (N. Y.); Brooke v. Filer, 35 Ind. 402; McVeigh v. U. S., 11 Wall. 259 (U. S.).

[34] Masterson v. Howard, 18 Wall. 99 (U. S.); Mutual Ben. Life Ins. Co. v. Hillyard, 37 N. J. L. 444.

[35] University v. Finch, 18 Wall. 106 (U. S.); Cohen v. New York Mutual Life Ins. Co., 50 N. Y. 610.

99. **Professions.**—The early English common law prevented barristers and physicians from suing for their services. These disabilities were never recognized in the United States, except in a regulative manner. Thus, statutes require physicians, attorneys, and brokers to be licensed before they may sue for services.[36]

100. **Convicts.**—In the absence of statutory provisions, a convict may enter into contracts and sue or be sued thereon. But if a state statute suspends civil rights of convicts, his contract would be void. He may be sued by creditors, for although his civil rights are suspended, the rights of his creditors continue.[37]

101. **Corporations.**—A corporation is said to be an artificial or fictitious person. More properly, it is said to be an aggregation of individuals who are treated in law as one person. The corporation has the capacity to contract, even if the legislature has not expressly granted that power. But the corporate powers being limited, certain contracts are beyond its charter powers. Such are called ultra vires contracts. The enforcibility of such contracts is discussed in the article on corporations.

102. **Power of a state to contract.**—The power of the United States and the various states to enter into contracts within their respective functions is an incident to the general right of sovereignty. Thus, where the proper officers of the United States Treasury Department had taken from an agent a voluntary

[36] Clark, Contracts (2d ed.), § 90.
[37] Clark, Contracts (2d ed.), § 89.

bond for the faithful performance of his duties, it was held to be a binding contract between him and his sureties and the United States, even if there was no positive law requiring such a bond.[38] "Upon full consideration of this subject," recites the opinion in the case cited, "we are of opinion that the United States have such capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers." The same rule applies to contracts by state governments.[39]

The United States and the states have the same power to sue and to maintain actions on contracts made with them that an individual has. But neither the United States nor a state may be sued without its consent.[40] The rule is the same as to foreign states or sovereigns.[41]

[38] United States v. Tingey, 5 Pet. 115 (U. S.).
[39] Danolds v. State, 89 N. Y. 36.
[40] Michigan State Bank v. Hastings, 1 Doug. 225 (Mich.).
[41] Mighell v. Sultan of Johore (1894), 1 Q. B. D. 149 (Eng.).

CHAPTER VIII.

LEGALITY OF THE SUBJECT MATTER.

103. **The subject matter as an element in a valid contract.**—In general, the parties may contract about whatever they choose. This freedom of contract is limited, however, to this extent: certain objects are illegal (1) either by statute or (2) by common law, or (3) they are forbidden because of public policy. Although all of the other requisites of a valid contract are present, if the parties have in mind one of these prohibited objects, the contract will not be enforced.[42] But if the contract can be performed in two ways, one legal and the other illegal, the law presumes, in the absence of proof to the contrary, that the legal method was intended, and this presumption will be adopted.

The three-fold classification given above is mainly for the sake of convenience. Objects cannot be placed with certainty into any one of the three classes, for a particular object may be illegal by statute in one state and by the common law in another jurisdiction. Whether an object is expressly forbidden by statute, or violates a positive rule of the common law, or is merely against the policy of the law in any particular state, depends to a great extent upon the way in which public sentiment has expressed itself in that state. Much of the common law has become so by an adapta-

[42] Hunt v. Knickerbacker, 5 Johns. 327 (N. Y.), LEADING ILLUSTRATIVE CASES; McMullen v. Hoffman, 174 U. S. 639.

tion of old statutes, and in many instances the courts have shown a disposition to legislate by interpreting the law and moulding it in accordance with public sentiment.[43]

104. **Contracts illegal by common law and by statute.**—Practically all of the states and also the federal government have statutes regulating the conduct of certain lines of business. Provisions as to weights and measures, as to dealing in certain commodities, as to the proper handling of drugs and explosives, as to the non-adulteration of foods, as to the employment of children in factories, and as to the guarding of machinery, are invariably upheld under the police power of the state, although they clearly interfere with the right of freedom to contract.[44] Contracts in violation of such provisions are void, although in all other respects valid. In the same class are statutes regulating the sale of liquors.

Thus, in Eaton v. Kegan,[45] a merchant was not permitted to recover for meal sold by the bag instead of by the bushel as prescribed by statute. Similarly, a sale of fertilizer not properly inspected was held illegal.[46] Where a statute forbids the employment of children, a father may not recover for the services of the employed child.[47] There may be no recovery for the value of liquor sold on Sunday in violation of a statute.[48]

[43] Miller v. Ammon, 145 U. S. 421, LEADING ILLUSTRATIVE CASES.

[44] Eaton v. Kegan, 114 Mass. 433.

[45] 114 Mass. 433.

[46] Pacific Guano Co. v. Mullen, 66 Ala. 582.

[47] Birkett v. Chatterton, 13 R. I. 299.

[48] Melchoir v. McCarty, 31 Wis. 252; Miller v. Ammon, 145 U. S. 421, LEADING ILLUSTRATIVE CASES.

Sunday contracts. Some states expressly forbid the making of contracts on Sunday. Others forbid the doing of any labor or business on Sunday. Under either of such statutes, a contract made on Sunday is invalid.[49] In some jurisdictions, work is prohibited, but only as to one's ordinary calling. On Sunday, A may agree to sell a horse, and on Monday refuse to abide by his promise. But acts of religious worship, or anything which is intended to preserve life or property, are excepted. Such acts must not be performed merely for the purpose of saving time, however, for in that event they would be illegal.[50] If a transaction is started on Sunday, it will be legal if completed on another day; but there is a conflict of authority as to whether a Sunday contract may be later ratified.[51]

105. **Same subject—Wagers.**—A wager is defined as a promise to give money or its equivalent upon the determination or ascertainment of an uncertain event. The consideration for such a promise is either something given by the other party to abide the event or a promise to give upon the event determining in a particular way.[52] This definition illustrates the difference between a wager and a premium or reward. The latter is an offer made with no condition as to the way in which the event determines and therefore is not illegal.[53]

[49] Smith v. C. M. St. P. Ry., 83 Wis. 271; see Bryan v. Watson, 127 Ind. 42.

[50] Aldrich v. Blackstone, 128 Mass. 148.

[51] McKinnis v. Estes, 81 Ia. 749; Grant v. McGrath, 56 Conn. 333; Russell v. Murdock, 79 Ia. 101.

[52] Anson, Contracts (Huffcut's 2d ed.), § 240; Love v. Harvey, 114 Mass. 80, LEADING ILLUSTRATIVE CASES.

[53] Porter v. Day, 71 Wis. 296; see subject, SALES, to distinguish wager and conditional promise.

Wagers were originally legal at common law in England and even in some of our states.[54] But the Statute of 16 Car. II, chapter 7, and 9 Anne, chapter 14, prohibited them, and there are similar statutes in most of the states. In a number of jurisdictions, these English statutes are considered as a part of the common law.

Contracts of insurance are really wagers. They are enforcible, however, as being within the policy of the law, for they result in positive good to the individual, and it has been clearly proven that they can be profitable to the insurer. The law carefully examines such contracts, however, and no one is allowed to be a party to them unless he has an insurable interest in the object insured, whether that be a person or property. This interest must be great enough to prevent the policy-holder from destroying the subject insured.[55]

Another example of a wagering contract is a sale of stock or grain where delivery is not intended.[56] The distinction between such an agreement and an agreement for future sale or delivery, which is not illegal, is that in the former, delivery is never intended, whereas in the latter, actual delivery is intended.[57] But where one of the parties has an honest intention to deliver, the contract will be upheld.[58] In Illinois, the statute would seem to cover any contract

[54] Campbell v. Richardson, 10 Johns. 406 (N. Y.); Cothran v. Ellis, 125 Ill. 496.

[55] See subject, INSURANCE.

[56] Such contracts are usually made on the stock exchange or board of trade.

[57] Harvey v. Merrill, 150 Mass. 1.

[58] See subject, SALES.

for future delivery, even where an actual delivery is contemplated.[59]

Lotteries are the distribution of prizes by lot or chance. They are another form of wagering contracts and are illegal. But where there is a mere distribution of prizes and no consideration is paid directly or indirectly for the right to participate, it is not a lottery.[60]

106. **Same subject—Usury.**—Practically all of the states have a rate of interest for the loan of money, beyond which it is not legal to exact interest. Laws dealing with this subject are usually termed usury laws. A contract which violates the provisions of such a statute is said to be usurious. In order to make the contract usurious, there must be an actual borrowing or lending of money.[61] Thus, it is permissible to place a penalty of a certain amount in a contract, in case of a default by one party. Where A agrees to convey Blackacre to B, and B promises to pay A $5,000 by January 1st, or pay an additional sum of $50 a day for each day of delay, such a contract is not usurious. But where A loans B $100, and it is agreed that B shall pay twelve per cent. interest, the contract is bad if the legal rate of interest is about seven per cent. Various penalties are attached by statutes to such usurious contracts. Some provide that neither the principal nor the interest may be recovered; others allow the recovery of the principal, but not of the interest. There is a conflict

[59] Schneider v. Turner, 130 Ill. 28.

[60] People v. Gillson, 109 N. Y. 389; Cross v. People, 18 Colo. 321.

[61] Struthers v. Drexel, 122 U. S. 487; Drury v. Wolfe, 134 Ill. 294.

of authority as to whether interest on overdue interest is usury.[62]

107. **Agreements contrary to public policy.**—While freedom of contract is a constitutional right which ought not to be interfered with except for good cause, individuals cannot be permitted to do or fail to do anything the performance or omission of which is in any degree clearly injurious to the public.[63] There are various classes of such agreements which will be considered more in detail.

Agreements affecting the public service. Agreements which tend in any way to affect the public service are illegal. Within this class are agreements for the sale of a public office or its salary or emoluments. Similar are promises to use personal influence, in distinction from purely professional services, to secure the nomination, election or appointment of a person to an office. An agreement to procure legislation or the favorable action of a public servant is illegal.[64]

Where A, a land-owner, agreed to use his influence for a public improvement, it was decided that he could not be held to his promise.[65] So, a quasi-public corporation[66] cannot make an agreement with an individual which will affect or limit public rights. For

[62] Young v. Hill, 67 N. Y. 162.

[63] W. Va. Transportation Co. v. Ohio, etc., Co., 22 W. Va. 600.

[64] Schneider v. Local Union No. 60, 116 La. 270, LEADING ILLUSTRATIVE CASES.

[65] Doane v. Chicago City Ry. Co., 160 Ill. 22, LEADING ILLUSTRATIVE CASES.

[66] A quasi-public corporation is one which deals in a commodity which the public cannot well do without and in which the public consequently has an interest. It is to be distinguished from a public corporation which is conducted by the public. See subject, CORPORATIONS.

instance, an agreement as to the location of a railroad station may be invalid for this reason. The rights of the public govern; consequently, if the contract is fair to the public, it will be upheld.[67]

Agreements obstructing justice. The law will not uphold any agreement which perverts or obstructs justice. There are several illustrations which should be considered.

Champerty is the making of an agreement to carry on another person's suit in consideration of the receipt of a part of the amount to be recovered. Maintenance arises when a person maintains a suit or quarrel to the disturbance or hindrance of a right. Both of these were crimes under the old English common law. But in the United States, the rules have been modified and are not very definitely settled. In some states, they have been discarded entirely, whereas, in others, they exist only by virtue of statutes.[68] Maintenance, where recognized, is confined to an improper and intentional stirring up of strife.[69]

While the policy of the law is in favor of the settlement of litigation, individuals cannot be permitted to dispose of matters in which the people of the whole state have a vital interest. Hence, courts will disregard any agreements to compound a crime or to stifle a prosecution. The private injury involved in the matter may be settled if there is no agreement to forbear prosecution.[70] Some authorities permit the making of an agreement between the parties in case

[67] Beasley v. T. & P. Ry. Co., 191 U. S. 492.
[68] Ackert v. Barker, 131 Mass. 436, LEADING ILLUSTRATIVE CASES.
[69] Perine v. Dunn, 3 Johns. 508 (N. Y.).
[70] Sloan v. Davies, 105 Ia. 97; Barrett v. Weber, 125 N. Y. 18.

of slight misdemeanors. In any event, it must appear that the crime had been committed or that the prosecution was actually pending at the time the agreement was made, in order to make the agreement invalid.[71]

Agreements to procure, give or suppress evidence are void.[72] Anything inconsistent with the impartial course of justice will not be upheld even if the intent of the parties is not fraudulent, and although no evil resulted.[73] A contract whereby the defendant is to pay the plaintiff a certain compensation if he is successful in detecting acts of larceny by the employees of the defendant's manufacturing plant is illegal. Inasmuch as it tends to induce the plaintiff to make charges in order to earn the money, the agreement will not be upheld by the courts. "It is the contingent nature of the compensation and its tendency to induce false charges and all the fraud and trickery of the private detective business that prima facie stamps this contract with illegality."[74] Similarly, promises to submit to arbitration are regarded by the courts as attempts to oust them from their jurisdiction. While it is legal to make as a condition of a contract that disputes arising therefrom shall be referred to arbitration before any right of action may arise, it has been held illegal to agree to refer all matters to arbitrators and to them alone, for the latter agreement attempts to prevent any action being brought

[71] Schultz v. Catlin, 78 Wis. 611; Columbia Lodge v. Manning, 57 N. J. Eq. 338.

[72] Langdon v. Conlin, 67 Nebr. 243.

[73] Willemin v. Bateson, 63 Mich. 309.

[74] Manufacturers Bureau v. Everwear Hosiery, 138 N. W. 624 (Wis.).

at all.[75] Statutes have modified this common-law rule, and arbitration agreements are very generally upheld.

To permit an employer to enter into an agreement with his employee, as part of the contract of employment, whereby the employee deprives himself of rights which he would ordinarily possess under the common law or by statute would be an obvious obstruction of justice. Thus, a contract by A and B, wherein A agrees not to sue his employer, B, for any injuries he may sustain while in the master's employ, would be invalid. Likewise, a common carrier may not exempt itself from liability to its passengers either for its own or its employees' negligence. But a common carrier may exempt itself from liability as an insurer of the safety of the passengers.[76] Some authorities hold that a telegraph company may not exempt itself from loss on account of the delay in the transmission of a message, while others hold that it may.[77] Still other jurisdictions take a middle course and permit such an exemption unless the delay is due to defective instruments or to want of skill or ordinary care on the part of the operatives.

Agreements contrary to good morals. Agreements which are *contra bonos mores* (against good morals) are those contrary to ethical principles and established rules of decency. For instance, a contract involving sexual intercourse and illicit cohabitation, although it is not punishable criminally unless such

[75] Clark, Contracts (2d ed.), p. 243; Edwards v. Insurance Society, 1 Q. B. D. 563 (Eng.); Niagara Fire Insurance Co. v. Bishop, 154 Ill. 9.

[76] Davis v. Cent. Vermont R. R. Co., 29 Atl. 313.

[77] W. U. Telegraph Co. v. Blanchard, Williams & Co., 68 Ga. 299.

cohabitation is open and notorious, is an illegal contract.[78] Even though an agreement be an innocent one of itself, if one of the parties intends to perform for an immoral purpose, it is illegal. Thus, it is perfectly permissible to hire a cab or to rent a flat, but it is not permissible if done with the intention of violating good morals.[79]

108. **Contracts in restraint of trade.**—Contracts in restraint of trade are of two kinds: (1) those between individuals for the benefit of one at the other's expense; and (2) combinations for mutual benefit.

Originally, any contract in restraint of trade was invalid, but with the growth of trade, partial restraint was allowed as to time or as to place, so long as it was not as to both. Later, the case of Maxim-Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt[80] established the correct test, namely, whether the restraint is reasonably necessary between the parties for the protection of their business and is not injurious to the public.[81] Under this rule, a promise not to divulge a trade secret may be rightfully upheld although the agreement is unlimited both as to time and place.[82] This rule also permits the protection of a holder of a patent, although a monopoly is thereby created. But a patent is in reality a monopoly which has been authorized by the govern-

[78] Edmonds v. Hughes, 115 Ky. 561; Boigneres v. Boulon, 54 Cal. 146, LEADING ILLUSTRATIVE CASES.

[79] Ernest v. Crosby, 140 N. Y. 364; Graves v. Johnson, 156 Mass. 211.

[80] 1894, 1 Ch. C. A. 630 (Eng.); Bishop v. Palmer, 146 Mass. 469, LEADING ILLUSTRATIVE CASES.

[81] Wood v. Whitehead Bros. Co., 165 N. Y. 545.

[82] Martin v. Murphy, 129 Ind. 464.

ment and is, therefore, presumably not prejudicial to the public.[83]

Attempts by dealers to control prices are contrary to public policy if the commodity is a necessity.[84] Certain combinations will be permitted, however, where the purpose is to prevent ruinous competition. The test again is whether the restraint is reasonable and not prejudicial to the public interest. Thus, a corner of a necessity of life is not only illegal but criminal as well.[85] Even owners of patented articles have no right to combine for the purpose of restraining competition.[86] The same rule applies to an unpatented product of a patented machine.[87]

The Sherman Act, called the anti-trust law, was passed by Congress in 1890. Its provisions forbid any combination in restraint of trade. Under this act, various monopolies have been prosecuted. This law has been construed by the Supreme Court of the United States to permit a reasonable restraint of trade. Many of the large railroads and corporations have been forced to dissolve by virtue of its scope.[88]

It is thought by some that agreements among workmen to control the price of their labor should be held illegal. The weight of authority, however, regards such combinations as legal so long as unlawful means are not used to gain their ends. The courts seem to feel that the workingman needs greater protection

[83] Good v. Daland, 121 N. Y. 1.

[84] Samuels v. Oliver, 130 Ill. 73; Leonard v. Poole, 114 N. Y. 371.

[85] Wright v. Cudahy, 168 Ill. 86.

[86] Vulcan Powder Co. v. Powder Co., 96 Cal. 510.

[87] Standard Mfg. Co. v. United States, 33 Sup. Ct. 9.

[88] Northern Securities Co. v. United States, 193 U. S. 197; United States v. American Tobacco Co., 221 U. S. 106; see subject, TRUSTS & MONOPOLIES.

than the capitalist in order that his skill may be developed and in order that he may not be subjected to the dangers of too keen competition. The true test is to determine from the circumstances of each case whether the restraint is reasonably necessary to the parties and is not prejudicial to the interests of the public.[89] Any concerted attempts to interfere with trade which comes under the head of interstate commerce is a violation of the Sherman Act.[90]

Certain agreements are illegal because they tend to prejudice interstate or international relations. A contract by a citizen of one state with subjects of a belligerent state (one at war) is illegal.[91] Similarly, an agreement which contemplates action hostile to a friendly nation or its laws is void.[92]

109. **Contracts restraining marriage.** — Agreements harmful to the marriage relation are illegal. The policy of the law is against any harm to the freedom or security of marriage. So, a promise, although there was a consideration, to marry no one but the promisee, was held to be void in Lowe v. Peers.[93] Similarly, the court held illegal a wager that one would not marry for five years.[94] Attempts to make pecuniary gain from marriage are illegal, and under this rule fall the operations of the marriage bu-

[89] Kemp v. Division No. 241, 255 Ill. 213; 7 Ill. Law Review 320; Hey v. Wilson, 16 L. R. A. (N. S.) 85, note.

[90] Lowe v. Taylor, 208 U. S. 274.

[91] Montgomery v. United States, 15 Wall. 395 (U. S.).

[92] Graves v. Johnson, 156 Mass. 211; Corbin v. Houlehan, 100 Me. 246, LEADING ILLUSTRATIVE CASES.

[93] 4 Burrows 2225 (Eng.).

[94] Hartley v. Rice, 10 East. 22 (Eng.); Sterling v. Sinnickson, 5 N. J. L. 756, LEADING ILLUSTRATIVE CASES.

reaus.[95] Thus, in the case of In re Grobe's Estate,[96] the plaintiff was to receive a fee for information concerning a woman whom the defendant desired to marry. The suit to recover the fee failed, for the agreement was held to be analogous to a marriage broker's illegal contract. On the other hand, agreements not to marry a person under a certain age, or in a certain degree of relationship, or in a certain family, or not to marry a second time, are valid.[97] These decisions find their basis in the public policy which favors a limited restriction of marriage along certain lines, as infancy, relationship, and good morals.

Agreements providing for separation in the future are invalid because they tend to make the marriage relationship unstable. But where separation has taken place or has been decided upon, they are enforcible, as the best way out of a difficulty which already exists.[98] But any collusion between the parties in regard to a divorce is illegal.[99] Moreover, an agreement to pay a consideration for the performance of marriage duties is void. The law assumes that the parties will perform their marital obligations without inducement.[1]

110. **Fiduciary relations.**—A contract which attempts to corrupt one who occupies a fiduciary relation with reference to others is illegal. Thus any

[95] Duval v. Wellman, 124 N. Y. 156.

[96] 127 Iowa 121.

[97] Hogan v. Curtin, 88 N. Y. 162; Siddons v. Cockrell, 131 Ill. 653.

[98] Luttrell v. Boggs, 168 Ill. 361; Baun v. Baun, 109 Wis. 47.

[99] Irvin v. Irvin, 169 Pa. 529; Beard v. Beard, 65 Cal. 354.

[1] Michigan Trust Co. v. Chapin, 106 Mich. 384; Miller v. Miller, 78 Iowa 177.

agreement which tends to place a person under such influences or temptations as will affect the rights of third persons or cause him to violate a confidence placed in him are opposed to public policy. A good illustration is a promise to give another a position if the promisor becomes an officer of a corporation through the promisee's influence.[2]

111. **Effect of illegality—In general.**—Thus far, the different classes of objects which are illegal have been considered. As far as the validity of the contract is concerned, the law makes no distinction between acts *malum in se,* which are inherently bad or immoral, and acts *malum prohibitum,* which are merely forbidden acts. If the object is illegal, the contract is invalid.[3] But this distinction as to inherent badness is of considerable value in determining the relief which will be granted to the parties and especially in considering the rights of third parties.

In no event may an illegal contract, known by the parties to be so, be enforced as between the parties.[4] Neither will the law, as a rule, aid the promisee in recovering his consideration.[5] The courts will not assist a party who must disclose and rely upon an illegal transaction as the ground of his claim. Some cases hold, however, that where a party shows an intention of abandoning the contract, if he does so in time, the amount expended may be recovered. It is

[2] West v. Camden, 135 U. S. 507; Greenhood, Public Policy, pp. 292-326.

[3] United States v. Owens, 2 Peters 527 (U. S.).

[4] Brady v. Huber, 197 Ill. 291, LEADING ILLUSTRATIVE CASES; Szlauzis v. Szlauzis, 255 Ill. 314, LEADING ILLUSTRATIVE CASES.

[5] McNulta v. Corn Belt Bank, 164 Ill. 427; Stewart v. Thayer, 170 Mass. 560.

considered that there is a *locus penitentiae,* or place to repent, and if the party grasps his opportunity, he will be aided. Thus where A repents of his bet and demands the return of the money which is still in the hands of the stakeholder, A may recover the money he placed with the stakeholder at any time before it has been paid over to B. The reason for this rule lies in the policy of the law to discourage executed illegal acts. The recovery is based on the theory of quasi-contract, however.[6] But to invoke this rule the object of the contract must not be *malum in se* (inherently bad).[7]

Similarly, where the parties are not equally in the wrong, that is, not in *pari delicto,* the one who is the least guilty may recover what he has parted with in those cases where the law was made for the protection of the one seeking relief. An example is to be found in the remedies afforded to those paying usurious interest, and to those who have been unduly influenced to enter into an illegal agreement.[8]

112. **Effect of promises made regarding past illegal transactions.**—Where a promise is made for the payment of money due or to become due on a past transaction, the validity of the promise depends upon the determination of whether the past transaction is illegal or merely void. If the object of the past transaction is an act *malum in se* (inherently bad), it is illegal in the strict sense of the term; but if it is *malum prohibitum* (a prohibited evil) it is

[6] See subject, QUASI-CONTRACTS; Tyler v. Carlisle, 79 Me. 210, LEADING ILLUSTRATIVE CASES.

[7] Peters v. Grim, 149 Pa. St. 163; Taylor v. Bowers, 1 Q. B. D. 291 (Eng.).

[8] Crossley v. Moore, 40 N. J. L. 27; Duval v. Wellman, 124 N. Y. 156.

merely void. Where the transaction is strictly illegal, the promise is void whether under seal or not,[9] unless it is in the form of a negotiable instrument when it may be enforced only by purchasers for value in good faith without knowledge of its illegal taint.[10] This rule is well established and appears to be a reasonable one, but statutes in some states forbid this exception from being made. Those states apparently are not desirous of having any one possess rights founded on a violation of the law, even if he be an innocent holder of negotiable paper.

Where the transaction is merely void, the promise is invalid. If it is under seal, it will be enforced, for in such an event no consideration is necessary. But in a simple contract a promise to pay an unlawful debt is not a consideration which the law will recognize. Hence, the simple agreement must fail. Thus, where A and B have illicitly cohabited, a promise based on such past cohabitation would have no consideration. But if the promise is under seal, the specialty will be enforced. These rules do not apply to those states where the seal has been abolished.[11]

113. **Effect of intention.**—Ordinarily, the intention of the parties is immaterial since if a contract is illegal, it is so whether the parties knew it or not. But if the contract admits of being performed in a legal way not contemplated, it will be enforced.[12] Where one of the parties does not know that the other is violating the law, he may enforce the con-

[9] Luetchford v. Lord, 132 N. Y. 465.
[10] Sondheim v. Gilbert, 117 Ind. 71.
[11] Drennan v. Douglas, 102 Ill. 341.
[12] Fox v. Rogers, 171 Mass. 546.

tract. Although ignorance of the law excuses no one, ignorance of fact does. For instance, an actor who does not know that his producer is operating without a license, may recover for breach of his contract, even if the producer may not have known that a license was required.[13]

The object of the contract may be innocent, but if the intention of the parties is unlawful, the agreement is void unless the unlawful transaction has taken place.[14] The law, then, is not concerned with preventing the carrying out of the unlawful intention. Where only one of the parties has an unlawful intention, the fact that the other knows of the one's intention, does not render the agreement illegal unless the other does some act in furtherance of the unlawful design.[15] An exception exists where the unlawful intention amounts to a felony or is of a heinous nature.[16] If A is ignorant of B's unlawful intention, A is entitled to full benefit of the agreement or he may rescind it.

114. **Partial illegality.**—If the agreement is good in part, that part will be enforced if it is separable.[17] That is, if a promise is made along with other promises but it has a separate consideration and may be enforced by itself, the law will enforce it. But the

[13] Roys v. Johnson, 7 Gray 162 (Mass.); Miller v. Hirschberg, 37 Pac. 85 (Ore.).

[14] Sherman v. Wilder, 106 Mass. 537; Armstrong v. Bank, 133 U. S. 433.

[15] Bryson v. Haley, 68 N. H. 337; Corbin et al. v. Houlehan, 100 Me. 246, LEADING ILLUSTRATIVE CASES. The English rule considers knowledge of the other's unlawful intention sufficient to avoid the contract. See Pearce v. Brookes, L. R. 1 Exch. 213 (Eng.).

[16] Hanauer v. Doane, 12 Wall. 342 (U. S.).

[17] Rand v. Mather, 11 Cush. 1 (Mass.).

law will not sustain a promise based on a consideration partly bad and partly valid.[18]

115. **Effect on illegality of change of time or place.**—A contract valid in one state is valid everywhere unless injurious to the state in which it is sought to be enforced, or to the citizens thereof. So contracts against good morals, or tending to promote vice or crime, or against the settled public policy of the state will not be enforced, although they may be valid by the law of the place where made.[19] If a contract is invalid in one state, it is invalid everywhere. There is a clause in the Constitution of the United States which requires that each state give full faith and credit to the laws of every other state. Under this provision each state is compelled to recognize the statutes of its sister states.[20]

A contract illegal when made, may not be made legal by subsequent legislation.[21] Nor may changes in the law make a contract illegal if legal when made; although they may operate as a discharge by making performance impossible.[22]

[18] Ricketts v. Harvey, 106 Ind. 564.

[19] Swann v. Swann, 21 Fed. 299; Corbin et al. v. Houlehan, 100 Me. 246, LEADING ILLUSTRATIVE CASES.

[20] See subject, CONFLICT OF LAWS.

[21] Hughes v. Boone, 102 N. C. 137.

[22] Richardson v. Campbell, 34 Nebr. 181.

THE OPERATION OF CONTRACT

CHAPTER IX.

LIMITS OF CONTRACTUAL OBLIGATION.

116. **Scope of contractual obligation.**—After a contract has been created, it is necessary to determine to whom the obligation extends. The purpose of Part Three of this treatise is to ascertain who have rights and liabilities under a contract. In general, it may be said that no one but the parties to a contract can be bound by it or be entitled to rights under it. But under certain circumstances the rights and liabilities created by a contract may pass to a person or to persons other than the original parties, either by the act of the parties themselves, or by rules of law operating in certain events.[23] A discussion of these general principles will be the subject of the present chapter.

117. **A contract may not impose liability on a third party.**—A contract acts upon the parties, and is founded upon their assent to its terms. It follows that one not a party, and not assenting to its terms, may not be made to assume its obligation. So it is

[23] Anson, Contracts (Huffcut's 2d ed.), § 276.

said that "a man cannot, of his own will, pay another man's debt without his consent, and thereby convert himself into a creditor."[24]

Where A contracts with B to furnish him services, although A may under some circumstances procure C to do the work, A may not confer upon C the right to require payment of B. Nor will the law impose an obligation upon B because of the acceptance of the services, where there was no intention on B's part to enter into legal relations with C.

Thus, A took ice from the B company. Disgusted with B's service, A took ice from the C company. Later, without notice to A, B bought out C, and continued to furnish A with ice. When A learned of this fact he refused to pay for the ice. The court held that he need not pay, because B was making itself A's creditor without his consent.[25]

118. **Same subject—Apparent exceptions.**—Although one person may not, as a rule, by contract, impose liabilities on a third person, not a party, the doctrines of agency seem to violate this rule. The acts of an agent are done on behalf and usually in the name of his principal. But a contract by an agent binds the principal by force of a previous authority or subsequent ratification, which is really the assent of the principal to be bound. Wherefore, the contract which binds the principal is practically his contract. Thus, the liabilities are not imposed upon the principal.[26]

[24] Durnford v. Messiter, 5 M. & S. 446 (Eng.); Borden v. Boardman, 157 Mass. 410, LEADING ILLUSTRATIVE CASES.

[25] Boston Ice Co. v. Potter, 123 Mass. 28, LEADING ILLUSTRATIVE CASES.

[26] See subject, AGENCY; see also subject, TRUSTS.

Similarly, where John Doe assigns his rights, in a contract with Richard Roe, to John Styles, the latter becomes, in a sense, a party to the contract. The rules of assignment will be considered in a later section.[27]

119. **Duty of third parties.**—While a contract may not impose the burdens of an obligation upon one who is not a party to it, yet a duty rests upon persons, who are not parties to the contract, not to interfere with its performance. Thus, an action in tort will lie against a third person who induces a party to the contract to break it.[28] This is now the rule, regardless of malicious intention.[29]

In Lumley v. Gye,[30] A induced a singer, B, to break his contract with C, the manager of an opera house. C sued A for maliciously procuring the breach of contract, and A was held liable. This rule has been generally followed, although some jurisdictions confine the action to contracts of master and servant.[31]

But where A induces B not to enter into a contract, there is no actionable wrong. This case is to be distinguished from the inducement to break a contract. But a conspiracy by more than one person to induce another not to make a contract may be actionable.[32]

120. **Rights of a third person—English rule.**—At early common law in England, although there is some dispute, it was said that if A and B made a contract

[27] See § 125.

[28] Anson, Contracts (Huffcut's 2d ed.), § 279; Walker v. Cronin, 107 Mass. 555, LEADING ILLUSTRATIVE CASES.

[29] Quinn v. Leathem (1901), A. C. 495 (Eng.).

[30] 2 El. & Bl. 216 (Eng.).

[31] Clark, Contracts (2d ed.), p. 350.

[32] Vegelahn v. Gunter, 167 Mass. 92; 18 Harvard Law Review 423.

for the benefit of C, who was nearly related to the promisee, a right of action on such contract would vest in C. But later, any such doctrine was overruled by the case of Tweddle v. Atkinson,[33] wherein the court held that no stranger to the consideration may take advantage of a contract, although made for his benefit. This is the English rule today, which holds that a third party, the beneficiary, has no right of action on such a contract, although executed for his benefit. This rule has been adopted by the Massachusetts courts, and a few other states.[34]

121. **Same subject—New York rule.**—In New York, and most states, the courts have refused to recognize the doctrine that C, for whose benefit A and B have made a contract, may not sue the promisor. The leading case for this doctrine is Lawrence v. Fox.[35] Therein, A loaned B a sum of money, in consideration of which B agreed to pay the same amount to C at a later date. C was a creditor of A. C sued B, and by a division of the court, four to seven, it was held that C might maintain the action. The broad rule was stated to be, that where a promise is "made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach." In many cases, the rule has been repeated in these broad terms.[36]

[33] 1 B. & S. 393 (Eng.).

[34] Exchange Bank v. Rice, 107 Mass. 37; Wheeler v. Stewart, 94 Mich. 445, 54 N. W. 172. By statutes, a beneficiary of an insurance policy may sue. Wright v. Vermont Life Ins. Co., 164 Mass. 302.

[35] 20 N. Y. 268, LEADING ILLUSTRATIVE CASES. The modifying decisions are admirably annotated in 2 N. Y. Dig. 909.

[36] Bassett v. Hughes, 43 Wis. 319; Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427.

Various theories are advanced to support this departure from the common law. One is that the beneficiary should have the right to sue because he is the sole person who is injured when the contract is broken. Another is that it is a rule of convenience and procedure, because it keeps out nominal parties.[37] This theory arises from provisions of code states, which state that the "real party in interest" may sue.[38]

122. **Same subject—Limitations to the New York rule.**—By the weight of authority, there must be something more than a mere incidental benefit to the third person. The contract must have been entered into for his benefit, and he must have some legal or equitable interest in its performance.[39] Thus, where A mortgages his land to C, then conveys that land to B, who in turn assumes the mortgage, C may sue B on the contract whereby B agreed with A to pay the mortgage to C.[40] But suppose that X owns land, which he mortgages to A. X then conveys to Y, who does not assume the mortgage. Y conveys to Z, who assumes the mortgage. It is held in such a case that A cannot sue Z.[41]

In Davis v. Clinton Works,[42] the water works company agreed with the city for a certain compensation to supply water for public purposes. This included the extinguishment of fires. A, who was a resident of the city, had his house destroyed by fire because

[37] Dean v. Walker, 107 Ill. 540.
[38] 9 Cyclopedia Law and Procedure, p. 380.
[39] Durnherr v. Rau, 135 N. Y. 219.
[40] Bay v. Williams, 112 Ill. 91.
[41] Vrooman v. Turner, 69 N. Y. 280.
[42] 54 Ia. 59.

the water company failed to supply the water according to its contract. A sued the company to recover for his loss, claiming that he was the beneficiary of the contract. It was held that he could not recover, since the contract was not made for his benefit.

The apparent result, at least in New York, is that such agreements will be enforcible by a third person, only where the promisee was under a duty to provide for the third person and the contract is made to fulfill that duty.

123. **Same subject—Release.**—It is generally held that the promisee may release the promisor from his obligation, if it is done before the third party, who is the beneficiary, has accepted or acted upon the promise,[43] but not afterwards. But if the promisor has a good defense against the promisee, it will be good against the third party. Thus, where A agrees with B to pay C, if A's promise was induced by the fraud of B, this may be proved in an action by C.

124. **Same subject—Sealed contracts.**—The rule of Lawrence v. Fox applies only to simple contracts. Where the contract is under seal, at common law the third party may not sue. But this rule has been modified by statutes, and decisions thereunder, which permit the beneficiary to sue on the sealed instrument.[44] Where the third party may sue on the sealed instrument, the question arises as to whether the defendant is limited to the defenses of an action of covenant, or may make use of those of assumpsit.[45]

[43] Kelly v. Roberts, 40 N. Y. 432.

[44] Anson, Contracts (Huffcut's 2d ed.), §§ 284, 290; Webster v. Fleming, 178 Ill. 140, 52 N. E. 975.

[45] § 12.

CHAPTER X.

THE ASSIGNMENT OF CONTRACTS.

125. **Assignment.**—A contract ordinarily affects only the parties to it. But these parties may, either by their own acts or by operation of law, be replaced by others, who then assume their rights and obligations. The operation by which such a change takes place is called the assignment of the contract.[46]

126. **Liabilities may not be assigned.**—A person may not assign his liabilities or debts. This rule is based on sense and convenience. When A owes B fifty dollars for a horse, A may not assign his debt to C without B's consent. If B consents, there is, in reality, a new contract. The converse of the rule that a promisor may not assign his liabilities under a contract, is that a promisee cannot be compelled by the promisor or by a third party to accept performance of the contract from any but the promisor.[47]

A party contracts with reference to the character, credit and substance of a particular person, and could this person place someone else in his place to make good his liability, there would be no safety in contract.

In Robson v. Drummond,[48] A let a carriage to B at a yearly rent for five years. He agreed to paint it every year and keep it in repair. C was a partner

[46] Heaton v. Angier, 7 N. H. 397, LEADING ILLUSTRATIVE CASES.
[47] Cannon v. Kreipe, 14 Kans. 324.
[48] 2 B. & A. 303 (Eng.).

of A, but B contracted with A alone. After three years A retired from business. B was informed that C was thenceforth answerable for the repair of the carriage and would receive the payments. B refused to deal with C, and returned the carriage. It was held that he was entitled to do so.

The rule is modified where the contract engages a party to do work which requires no special skill. If it does not appear that A has been selected with reference to any personal qualification, X cannot complain if A gets the work done by an equally competent person, B. But A is liable for B's poor work. In the United States A may assign to B the right to payment.[49] Where an interest in land is transferred, liabilities attaching to its enjoyment pass with it.[50]

127. **Assignment of rights.**—Passing from the question of assignment of liabilities to those of rights, the rule at common law was that rights arising out of a contract may not be assigned, so as to enable the assignee to sue in his own name. An exception existed in the case of negotiable instruments by the rule of law merchant. The general rule is sometimes expressed by the phrase "a chose in action is not assignable."

But an assignment of rights in a contract creates rights in a court of equity, and the law has taken cognizance of these equitable rights. Wherefore, the assignee is at least permitted to sue in the name of the assignor.[51]

[49] Devlin v. New York, 63 N. Y. 8.

[50] See subject, REAL PROPERTY.

[51] Anson, Contracts (Huffcut's 2d ed.), § 295.

The assignee has acquired further rights by statutes. These give him the power to sue in his own name. When this statutory right does not exist, he is said to possess a power of attorney, by virtue of the assignment from the assignor, to sue in the assignee's name.[52]

128. **Novation.**—Strictly speaking, the only method by which rights under a contract may be transferred, is not by an assignment but by a substituted agreement, termed a novation.

Thus, if A owes B $100, and B owes C $100, an agreement between the three whereby A pays C $100, constitutes a new contract. The consideration for A's promise is the discharge of B; the consideration for B's discharge of A is the extinguishment of his debt to C; the consideration of C's promise is the substitution of A's liability for that of B.[53] Furthermore, there must be ascertained sums due from A to B and B to C, and the agreement must be definite.[54]

129. **Assignments in equity.**—As indicated, courts of equity permit the assignment of contractual rights, whether those rights were legal or equitable rights. If they were equitable, the assignee might sue in his own name; if legal, equity would enable the assignee to sue, if there was any difficulty at law. But an assignment cannot be enforced in equity if the assignee can proceed at law, unless the remedy would be incomplete or inadequate.[55] To enforce an assignment it is said that there must be a consideration

[52] Glenn v. Marbury, 145 U. S. 499.
[53] Heaton v. Angier, 7 N. H. 397.
[54] Anson, Contracts (Huffcut's 2d ed.), § 297.
[55] Carter v. United Ins. Co., 1 Johns. Ch. 463 (N. Y.); see subject, EQUITY.

given by the assignee.[56] Furthermore, the person who is liable must receive notice of the assignment before it is effectual. Thus, if A assigns to B his right against C, and C pays A before notice of the assignment is given to him, C is discharged from his debt. But if he pays A after B has served him with notice, C is still liable to B. But as between the assignor, A, and the assignee, B, the assignment is always enforcible.[57]

The rule is thus expounded by Turner, L. J., in Stocks v. Dobson:[58] "The debtor is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid? If a court of equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment, it would be impossible for a debtor safely to pay a debt to his creditor. The law of the court has, therefore, required notice to be given to the debtor of the assignment in order to perfect the title of the assignee:"

130. **Defenses.**—In addition to the rules discussed the assignee takes subject to all defenses and equities that the debtor may have set up against the assignor. Thus, where A assigns to B his right against C, if A

[56] Anson, Contracts (Huffcut's 2d ed.), § 302. But usually the debtor cannot defend against the assignment on this ground.

[57] Heermans v. Ellsworth, 64 N. Y. 159; Littlefield v. Storey, 3 Johns. 425 (N. Y.).

[58] 4 De G. M. & G. 11 (Eng.).

has no right of action against C, the latter may in a suit by B so defend. The general rule, both at law and in equity, is that no person may acquire title to a chose in action or any other property, from one who has himself no title to it. The assignee must take care to ascertain the exact nature and extent of the rights he is acquiring, for he cannot take more than his assignor can give.[59]

131. **What is assignable.**—Generally, anything which directly or indirectly involves a right of property is assignable. There is no doubt about the right to assign mere money demands. Where A owes B, B may assign his claim to C, who may then sue A, after notice, and according to the procedure enforced. But if the case is one wherein A agrees to sell something to B, who agrees to pay on a certain day, a problem arises whether or not A, who assigns his right of payment to C, may also transfer his liability to perform. Generally, he may not. The assignor remains liable to perform under the general rule as to assignment of liabilities, discussed in a previous section. But the argument is made that since the assignor remains liable on the contract, the assignment should be good, since the seller may still look to him.[60]

132. **Same subject—Personal service contracts.**—Personal service contracts are not assignable. A person who has made a contract to render personal services, may not assign his right to render such services, but he may assign his right to receive pay for them after they have been rendered by him. The reason

[59] Anson, Contracts (Huffcut's 2d ed.), § 304.
[60] Arkansas Co. v. Belden Co., 127 U. S. 379.

for the non-assignability of such contracts is that they do not survive the death of either party.[61] Although the death of a party to most contracts passes all rights of action for breach of contract, and all liabilities, to his representatives, contracts of personal service are obviously not of this class. Thus, where A was employed by B to work as a farm hand for one year, and B died within the year, it is not feasible nor possible for the administrator to carry out the contract.[62]

This rule is even more obvious where the contract involves personal skill. If A agrees with B to paint his carriage, it is presumed B engaged A because of his skill and ability as a painter, and the services of another, however skillful, could not take the place of A.[63]

133. **Form.**—There is no particular form prescribed in which to execute an assignment. An assignment may be made orally or in writing, provided always that the assignor clearly expresses his intention to make an assignment.[64]

Statutes, however, frequently require an assignment to be written. In such an event if it is not in writing, it is only an equitable assignment. If suit be brought in the assignee's name, it must be in equity; if at law, it must be in the assignor's name.[65] If the claim is assigned in writing, the surrender of the writing to the assignee would be the usual method.

[61] Tolhurst v. Ass'n, L. R. (1902), 2 K. B. 660 (Eng.).

[62] Lacy v. Getman, 119 N. Y. 109.

[63] Robson v. Drummond, 2 B. & A. 303 (Eng.).

[64] Row v. Dawson, 1 Ves. Sr. 331 (Eng.); Risley v. Phoenix Bank, 83 N. Y. 318.

[65] Clark, Contracts (2d ed.), p. 367.

The operative words of an assignment which are generally used are "sell, assign and transfer," or "sell, assign, and set over."

134. **Assignment of future earnings.**—As indicated, a sum due from A to C for services rendered, may be assigned to B. The problem then arises, may C assign his future earnings to B. The cases have been divided into two classes. If there is an existing contract of employment, and the rule seems to cover any existing employment, C may assign his future earnings as to that employment.[66]

Thus, C is working for the A firm. To B he assigns his last week's salary. This assignment is valid. To D he assigns his next week's salary. This assignment is also valid. But if the A firm discharges C this week, or if C terminates his employment with the A firm, and begins work with another company, the assignment of next week's earnings is not valid as to any earnings due from the new company. A new assignment would be necessary, executed after he had a contract with his new employer.

The basis of the rule is that one may not assign future earnings not based upon an existing contract. Such earnings constitute a mere expectancy. This rule applies even where the assignment uses such general terms as "A hereby assigns his wages due and to fall due from any and all present and future employments."[67]

135. **Contracts and claims non-assignable.**—A and B may agree by the terms of their contract that it

[66] Carter v. Nichols, 58 Vt. 553, LEADING ILLUSTRATIVE CASES.

[67] Allen v. Pickett, 61 N. H. 641; Adams v. Willimantic Linen Co., 46 Conn. 320; O'Keefe v. Allen, 20 R. I. 414.

shall not be assignable. Such an agreement renders any assignment made without the consent of A and B inoperative.[68]

Moreover, assignments of salaries by public officers, as well as pensions, are inoperative not only by the general weight of authority, but by statutory enactments as well.[69] The rule is based on motives of public policy. For instance, the validity of an assignment of a pension would defeat the purpose of granting pensions.

In general, tort rights are not assignable. If the right of action arising from the tortious act will, upon the death of the injured person, survive to his personal representatives, it is assignable; otherwise, it is not.[70] Thus, a right of action for a purely personal tort, such as slander, breach of promise, assault and battery, and false imprisonment would not be assignable. The damages in such cases are based entirely upon personal suffering, and must be recovered by the injured party.[71]

Some authorities permit an assignment of a right of action arising from a tort to property, such as trespass. There is a similar division of authorities as to the action for deceit, and as to an assignment of a judgment rendered for a tort.[72]

136. **Partial assignments.**—Inasmuch as a debtor has a right to pay his debt as a whole, he may not be subjected without his consent to separate actions by

[68] See cases collected in 4 Cyclopedia Law and Procedure, p. 21.
[69] Bowery Nat'l Bank v. Wilson, 122 N. Y. 478.
[70] Stebbins v. Dean, 82 Mich. 385.
[71] North Chicago St. Ry. Co. v. Ackley, 171 Ill. 100.
[72] See cases collected in 4 Cyclopedia Law and Procedure, pp. 24-26.

different persons. If A owes B $500, B may not assign to C a claim against A for $100, to D for $200, and to E for $200. Otherwise, the burden would be on the debtor to determine the relative rights of the substituted parties.[73] But A may consent to the partial assignment, and then the assignee may recover in an action at law.[74]

In equity, a partial assignment will be upheld if notice has been served. While B is not bound to pay a partial assignment at law, he is bound, in equity, to retain in his hands the amount represented by the partial assignment when he settles with A, the original creditor. This rule is supported by the argument that since in an action in equity both the assignor and the debtor may be joined as parties, the whole controversy can be determined in one suit.[75]

137. **Priority of assignments.**—Where A assigns to B his claim against C, and then, later, assigns the same claim to Y, the authorities are divided on the question as to whether B's rights are superior or inferior to Y. In England, in the United States Supreme Court, and in a number of states, it is held that the assignee who first serves notice on the debtor has the prior right. Thus Y, by serving notice first, would prevail over B. On the other hand, many states hold that the rights are determined by the priority in time of assignment, regardless of notice. Thus, in such a case, B would prevail over Y.[76]

[73] Carter v. Nichols, 58 Vt. 553.

[74] James v. Newton, 142 Mass. 366.

[75] Field v. City of New York, 6 N. Y. 179; Clark, Contracts (2d ed.), p. 366.

[76] Clark, Contracts (2d ed.), p. 370.

138. **Assignment and negotiability distinguished.**—In the case of certain contracts, like promissory notes, by the law merchant a right analogous to that of assignment arises. Thus, a promissory note is said to be negotiable. There are essential differences between assignment and negotiability, which will be noted briefly.

Negotiation means a transfer in the form and manner prescribed by the law merchant.[77] Its effect is to transfer the legal title of the instrument by A to B, so that B may sue in his own name. Moreover, if B gives a consideration for the instrument, buys it before it falls due, and has no notice of any defenses between the maker of the instrument and A, the maker cannot defend in a suit against himself by B. Notice of the transfer to B need not be given. These features, it will be remembered, are not true of assignments, where defenses may be made, where a legal title is not transferred, and where notice is necessary.[78]

139. **Assignments by statute.**—Choses in action or rights arising from contracts are made assignable by statute in the several states, but the statutes are not uniform in their terms or construction. The statutes usually give the assignee the right to bring the action in his own name.

The rules applicable to assignments in equity apply largely to the cases of statutory assignments. Every right of property which was assignable in equity and

[77] See subject, NEGOTIABLE INSTRUMENTS; Anson, Contracts (Huffcut's 2d ed.), §§ 306-317.

[78] Hoyt v. Thompson, 5 N. Y. 320.

survives to the personal representatives of the owner, is assignable under the statutes.[79] The right and duty to render personal service, however, may not be assigned.[80] The right of action for a tort is not generally assignable, except such actions for torts as survive to the personal representatives.[81] The assignment may be conditional or for security. Notice to the debtor is not necessary as between the parties to the assignment, but should be given by the assignee if he wishes to protect himself from subsequent assignments by the assignor, or from payment being made to the assignor by the debtor.[82] The assignee takes subject to equities in favor of the debtor at the time of the assignment.[83]

140. **Assignment by operation of law.**—Independent of the acts of parties, rights and liabilities in contract may be transferred from one person to another. Rights arising from contract are transferred by operation of law to others in the case of interests in realty which run with the land, and when by the death or bankruptcy of a party his representatives acquire his rights and liabilities for certain purposes. Thus, agreements or covenants in a lease which "touch and concern the thing demised," as to repair, pass to the assignee of the lessee, whether or not expressed to have been made with the lessee and assigns.[84]

[79] Chapin v. Longworth, 31 Ohio St. 421; Palo Pinto Co. v. Gano, 60 Tex. 249.

[80] Hayes v. Willio, 4 Daly 259 (N. Y. C. P.), LEADING ILLUSTRATIVE CASES.

[81] Stewart v. H. & T. C. Railway Co., 62 Tex. 246.

[82] Fraley's Appeal, 76 Pa. St. 42.

[83] Spinning v. Sullivan, 48 Mich. 5; Kleeman v. Frisbie, 63 Ill. 482.

[84] Leppla v. Mackey, 31 Minn. 75.

The death of a party passes to his personal representative all his personal estate, all rights in action affecting it, and all liabilities chargeable upon it. Covenants affecting freehold pass to the heir or devisee of the realty. The exception to this rule is that contracts of personal service expire with either of the parties to them, and performance of contracts which depend upon personal skill or service may not be demanded of the personal representative. Nor does a breach of a contract which involves a purely personal loss, as a breach of promise to marry, give a right of action to the executors.[85]

The assignee of a bankrupt is appointed for the purpose of collecting the assets and settling the liabilities of the estate. The same principles which apply to personal representatives apply largely to him.

[85] Chamberlain v. Williamson, 2 M. & S. 408 (Eng.).

CHAPTER XI.

JOINT CONTRACTS—JOINT AND SEVERAL CONTRACTS—SEVERAL CONTRACTS.

141. **Classification.**—A contract may have more than one person on each side, to-wit, there may be more than one promisor or promisee. Thus: (1) A may make an agreement with B; (2) A may contract with B and C, or more persons; (3) A and X (or more) may contract with B alone; (4) A and X (or more) may contract with B and C (or more). The problem is to determine the respective rights and obligations of A, B, C, and X.

The first case is the normal case of one promisor and one promisee and does not concern this inquiry. The second case has one promisor and two promisees. The third situation contains two promisors and one promisee; and the fourth possesses two promisors and two promisees.

142. **Promisors and promisees.**—Promisors may be joint, or joint and several, or several. At common law, whenever an obligation was undertaken by two or more promisors, as in (2), the obligation was joint.[86] Thus, where a note is executed by A, B, and C in these terms: "We promise to pay," the obligation is joint. To create a joint and several obligation, or a several obligation, at common law there must be words of severance. Thus, if A, B, and C signed

[86] Alpaugh v. Wood, 53 N. J. L. 638.

this note instead of the above: "I promise to pay," the note would be joint and several.

If the language of the contract is ambiguous, the court will consider the nature of the agreement and who received the consideration to determine whether the obligation of the promisors is joint or otherwise. But statutes have modified these rules so that the presumption is that contracts having more than one promisor shall be joint and several unless there is an express intention that they shall be joint.[87]

Promisees may only be joint or several. They may not be joint and several.[88] If the language of the promise is at all open to construction, and the interest of the promisees is joint the right of action is joint. But if the interest is construed to be several, the right of action is several.

143. **Joint contracts.**—In a joint obligation, there is but one cause of action against the promisors. Where A, B and C are jointly liable to X, the latter must sue A, B and C in one and the same action. If A dies, the liability survives to B and C.[89] At common law, A's estate would not be liable to such a joint obligation. This is the doctrine of survivorship, but it has been modified by statutes in many states, whereby the deceased obligor's estate is made liable.[90] But in any case, the estate of the last survivor is liable to the promisee.[91]

[87] Stimson, American Statute Law, § 4113.

[88] Anson, Contracts (Huffcut's 2d ed.), § 329.

[89] Sundberg v. Goar, 92 Minn. 143; Anson, Contracts (Huffcut's 2d ed.), §§ 324, 325, 326.

[90] Stimson, American Statute Law, §§ 4113 and 5015.

[91] Neal's Exrs. v. Gilmore, 79 Pa. St. 421.

If a judgment is obtained against one joint obligor, it bars an action against another or against all jointly, except where one obligor was outside the jurisdiction when the original suit was filed.[92] These rulings have also been changed by statutes.

At common law, if X releases A, the result in a joint obligation is to release A, B and C. A voluntary release of one joint obligor is a release of all.[93] To avoid this effect, it is customary where X desires to release A but not B and C to execute what is known as a contract or covenant not to sue A. Thus, X promises A, for a consideration, not to sue him. This does not act as a technical release, but it is effective. Thereby X sues all of the parties but must refrain from seizing A's goods, or render himself liable in damages on his contract not to sue.[94] Wherever possible the courts will treat a release as a covenant not to sue.[95] Moreover, statutory enactments provide in some states that a release of one will not release all of the joint obligors. In the event one of the joint parties pays the entire obligation, he is entitled to contribution from the others.[96]

The rules so far discussed in this section apply to joint promisors. Turning to a consideration of the characteristics of joint promisees, the law requires that all surviving joint promisees join in the action.[97] If one dies, the right of action is in the survivors,

[92] Mason v. Eldred, 6 Wall. 231 (U. S.); Cox v. Maddux, 72 Ind. 206.
[93] Hale v. Spaulding, 145 Mass. 482.
[94] Parmelee v. Lawrence, 44 Ill. 405.
[95] Owen v. Homan, 4 H. L. Cas. 997 (Eng.).
[96] Anson, Contracts (Huffcut's 2d ed.), § 326.
[97] Sweigart v. Berk, 8 Serg. & R. 308 (Pa.).

and they alone may sue. The representative of the deceased may not sue or join with them. This is analogous to the survivorship of liability in the case of joint promisors.[98] Similarly, upon the death of the last survivor the right of action goes to his representative or executor.[99] Moreover, where A and B are joint promisees and C, the promisor, if A releases C, the action is barred and B may not sue. unless there is fraud or collusion on A's part.[1]

144. **Several contracts.**—If A and B bind themselves severally to C, the latter may claim the debt or performance against A and B separately. In such cases, C must sue either A or B, or he may sue A in one action and B in another, but he may not sue A and B in the same action.[2] The same rule applies to several promisees. If A and B are several promisees and X and Y are several promisors, A or B may sue X or Y, but A and B may sue neither. They may not be joined in an action.[3]

Where the promisors are severally liable, a judgment against A alone does not discharge B until the judgment is paid and satisfied.[4] Furthermore, the doctrine of survivorship does not apply to several contracts.

145. **Joint and several contracts.**—Where A, B and C promise X "jointly and severally," it is said that a joint and several contract has been created. The characteristics of such agreements differ greatly

[98] Donnell v. Manson, 109 Mass. 576.
[99] Stowell's Admr. v. Drake, 23 N. J. L. 310.
[1] Osborn v. Martha's Vineyard, 140 Mass. 549.
[2] Clark, Contracts (2d ed.), p. 383.
[3] Anson, Contracts (Huffcut's 2d ed.), § 329.
[4] Ward v. Johnson, 13 Mass. 148.

from those of joint obligations. Thus X may sue A or B or C separately or he may sue A and B and C jointly. But he may not sue A in one action, and B and C in another. X must sue each promisor separately or all together.[5]

The doctrine of survivorship applies only in a limited sense to joint and several contracts. Thus, if A dies, it is said that the joint liability rests on B and C; but the separate liability of the deceased may be enforced against his estate by filing a claim. The executor may not, however, be joined with the survivors in an action.[6]

A judgment, if unsatisfied, against one of the joint and several promisors is not a bar to an action against another.[7] Courts differ on the right to proceed against each creditor separately where a joint judgment has been obtained against all. The courts that deny the right take the view that having elected to proceed jointly, the creditor may not thus sue severally.[8] Other courts take the broad view that as long as the creditor remains unpaid, he may proceed against each promisor severally.[9]

A release of one joint and several promisor is a release of all, as in the case of a joint promisor. Courts, however, will not regard a contract not to sue as a technical release, and such a contract is the effective method of relieving the desired promisors from liability.[10]

[5] Cummings v. People, 50 Ill. 132.
[6] May v. Hanson, 6 Cal. 642; Eggleston v. Buck, 31 Ill. 254.
[7] Giles v. Canary, 99 Ind. 116.
[8] United States v. Price, 9 How. 83 (U. S.).
[9] Moore v. Rogers, 19 Ill. 347.
[10] Rowley v. Stoddard, 7 Johns. 207 (N. Y.).

Promisees, that is to say, creditors, may only be joint or several. They may not be joint and several. A promise cannot be so made as to entitle persons to sue jointly and severally.[11]

[11] Endith v. Vallentine, 63 Me. 97.

INTERPRETATION AND CONSTRUCTION OF CONTRACT

CHAPTER XII.

PRINCIPLES OF INTERPRETATION AND CONSTRUCTION.

146. **What is meant by interpretation and construction of contract.**—When a contract is involved in a law suit, it comes before the court for decision. The parties may disagree as to its existence, or as to its meaning and scope. If A claims that he made a contract with B, he must prove that contract. This involves the rules of evidence. After the contract is proved, its rights and obligations are determined by the rules of construction and interpretation.

147. **Rules of evidence.**—The rules of evidence relating to contracts are more properly a part of the article on Evidence. But certain fundamental principles require attention at this time.

Oral contracts. Contracts may be oral or in writing. Certain oral contracts falling within the provisions of the Statute of Frauds are unenforcible, and may not be proved. Such contracts, not being admitted to proof, do not enter into this discussion. Where a contract is oral, that is, where A and B agree by word of mouth to the sale and purchase of

A's horse for $100, the words of A and B may be proved by witnesses and their own statements. Furthermore, the material and relevant circumstances surrounding the formation of the oral contract may be admitted in evidence. If there is a dispute as to the terms, the jury must decide the facts and determine what the parties said and did and whether they intended to enter into a contract. If the jury find that there was such an intention, and find what was done and said, it is then for the court to say whether what they have said or done amounts to a contract, and what is its effect. Thus, what A and B said and did are questions of fact. The legal result thereof is a matter of law. Questions of fact are determined by the jury; matters of law by the court.

A person who is proved to have made an oral contract will not be heard to say he did not mean what he said. The law gives a person a state of mind or intention corresponding to the rational and honest meaning, not only of his words, but of his actions as well. Where the conduct of A towards B, judged by a reasonable standard, indicates an intention to agree as to the sale of a horse, that agreement is established as a fact by proof of such conduct. This is true, regardless of the unexpressed mind of A.

Written contracts. The rule just outlined applies to written contracts as well. In addition thereto, certain rules of evidence affect written contracts. Thus, where A and B reduce the terms of the contract to writing, the general rule is that neither may offer parol or extrinsic evidence to add to or vary the written agreement. Such parol evidence, which

means evidence outside of the agreement, includes both oral and written offers of evidence;[12] but it is inadmissible.[13]

Thus A and B have made a written contract for the sale of a horse for $100. Later, B insists that A stated he was to receive a whip as part of the bargain. Nothing was said of a whip in the written contract. Proof as to any conversation as to the whip is parol to the written agreement of the parties. This writing is held to be the final word as to what their bargain was; otherwise, there would be no value in writing a contract. Even if B could show a letter in which A promised the whip, this would not be admissible to vary the terms of the written contract, for this written evidence would also be parol.

The parol evidence rule protects the stability of contracts. If evidence were admissible in every case to add to or take from the terms of an agreement, which the court finds to be complete, every contract would be at the mercy of unscrupulous witnesses and perjured testimony.

The parol evidence rule is subject to exceptions, which permit the admission of certain extrinsic evidence. This admissible evidence may be classified into three heads:[14] (1) evidence as to the fact that there is a document purporting to be a contract, or part of a contract; (2) evidence that the professed contract is in truth what it professes to be; (3) evi-

[12] It may be conversations, or writings other than the written contract.

[13] Strictly parol does not mean oral, although frequently used in that sense, as parol contract. It may mean oral or written in the sense of extrinsic to and not a part of the writing in question.

[14] Anson, Contracts (Huffcut's 2d ed.), § 332.

dence as to the terms of the contract. These heads include the proof of the existence of a document; the evidence of the fact of an agreement, for some necessary element may be lacking or an agreement may be subject to an outside condition; and the proof of the terms, which may require extrinsic evidence to explain an ambiguity in the document or to include a usage.[15]

Sealed contracts. Before discussing the rules as to such exceptions, a distinction must be noted between written simple contracts and contracts under seal.[16] A contract under seal derives its validity from the form in which it finds expression. Therefore, if the instrument is proved to have an existence, the contract is also proved, unless there is evidence of circumstances, as fraud, preventing the legal formation of the contract, or the presence of an escrow condition. On the other hand, a written simple contract is merely evidence of the contract; it is not the contract itself.

148. **Same subject—Proof of the document.**—A contract under seal must, like any contract, be proved to have an existence. This is accomplished by evidence of the sealing and delivery of the instrument. At common law, if there is an attestation, it is necessary to call one of the attesting witnesses.[17] Statutes have greatly modified this rule by providing that the subscribing witness need not be called unless such a witness has been required by some law to attest

[15] Hall v. Davis, 36 N. H. 569, LEADING ILLUSTRATIVE CASES.

[16] Anson, Contracts (Huffcut's 2d ed.), § 333.

[17] Story v. Lovett, 1 E. D. Smith 153 (N. Y. C. P.), LEADING ILLUSTRATIVE CASES.

in order to make the instrument valid.[18] If the attesting witness were dead, or incapable, or out of the jurisdictional limits of the court, the proof might be made by proof of his handwriting.[19]

In proving a simple contract (whether oral or written) evidence, although parol, is always admissible to show that the party sued is the party who made the contract. If a contract is only partly in writing, evidence is admissible to supplement the writing in order to prove the existence of a contract. Thus, where A writes to B that he will pay a certain sum for a carload of potatoes, and to ship them, if B accepts the offer, the evidence of A's offer would be the written evidence of the letter, and the evidence of B's acceptance would be oral evidence as to the shipment.

Similarly, if a contract consists of several documents, oral evidence is admissible to show their connection. But where the contract is within the terms of the Statute of Frauds, one of the documents must contain a reference to the other before extrinsic evidence is admissible to explain the reference.[20] The loss of an instrument may be proved under the general rules of evidence.[21]

149. **Same subject—Fact of agreement.**—Parol or extrinsic evidence is always admissible to show that the document is not in fact a valid agreement. For instance, if one of the parties is an infant, who is incapacitated from contracting, that fact may be

[18] Anson, Contracts (Huffcut's 2d ed.), § 335, note; Wigmore, Evidence, § 1290, note 4; see Sanborn v. Cole, 63 Vt. 590.

[19] Richards v. Skiff, 8 Ohio St. 586.

[20] Anson, Contracts (Huffcut's 2d ed.), p. 323

[21] Wigmore, Evidence.

proved by parol evidence. Similarly, the want of genuine consent because of mistake or fraud may be shown. If the contract is simple, the want of consideration may be proved.[22] That is, evidence is admissible not to vary a written contract, but to show that there never had been a contract at all, for the writing does not conclusively establish the existence of the contract.[23] It may also be shown that there is a parol condition which suspends the operation of a contract, as an escrow.

150. **Same subject—Terms of the contract.**—It is the general rule that the written document or record of a contract may not be varied by parol evidence. The written statement is said to form the best evidence of the intention of the parties. There are certain modifications of this rule:[24] (1) proof of terms supplemental or collateral is admissible to complete a contract, although the remainder of the contract is in writing; (2) an explanation of terms is admissible in evidence; (3) evidence of a special usage may be admissible; (4) parol evidence is admissible in applying equitable remedies in a case of mistake.

Supplementary and collateral terms. Where all the terms have not been put in the document, parol evidence of the supplemental terms is admissible to complete the contract.[25] Such evidence may not vary but may only complete the terms of the contract. Thus, where a written contract for the sale of goods mentions the price, but is silent as to the terms of

[22] Reynolds v. Robinson, 110 N. Y. 654, LEADING ILLUSTRATIVE CASES.
[23] Burnes v. Scott, 117 U. S. 582; Leddy v. Barney, 139 Mass. 394.
[24] Anson, Contracts (Huffcut's 2d ed.), § 339.
[25] Lyon v. Lenon, 106 Ind. 567.

payment, the terms may be shown by parol evidence.[26] Furthermore, a subsequent agreement changing the terms of the original contract may be shown by parol evidence.[27]

Explanation of terms. The explanation of the terms of a written contract may be necessary, for instance, to identify the parties. Two persons may have the same name, or one of the contracting parties may be an agent.[28] Similarly, a description of the subject matter may need explanation. Where, for instance, A agreed to buy from B certain wool, described as "yarn wool," evidence of the quality and quantity of the wool was admissible.[29] Again, it may be necessary to explain some word or clause in the writing, which does not describe the subject matter of the contract, but which describes the amount and character of the responsibility undertaken by a party. Where a vessel is warranted "seaworthy," parol evidence is admissible to show what the parties intended by this phrase.[30]

In the explanation of terms, two kinds of ambiguities arise. One is termed a patent ambiguity, which is apparent on the face of the instrument; the other is called a latent ambiguity, where the ambiguity is not discovered until an attempt is made to perform the terms of the contract. Examples of patent ambiguities are cases where words are omitted, or are

[26] Jarvis v. Berridge, 8 Ch. App. 351 (Eng.); Horner v. Horner, 145 Pa. 258.

[27] Worrell v. Forsyth, 141 Ill. 22.

[28] Anson, Contracts (Huffcut's 2d ed.), § 341.

[29] Macdonald v. Longbottom, 1 El. & El. 977 (Eng.).

[30] Burgess v. Wickham, 3 B. & S. 669 (Eng.).

contradictory. Parol evidence is not admissible in such situations. But in a latent ambiguity, examples of which are the cases first discussed in this sub-section, parol evidence is admissible, as indicated.[31]

Proof of usage. Although a term is thereby added, or a different meaning is thereby given, evidence of the custom or usage of a trade, or a particular locality, is admissible. For instance, in a contract of marine insurance, there is a warranty of seaworthiness which by custom is always implied.[32] In Cooper v. Kane,[33] it was held that, where a contract for excavating city lots was silent as to whom the sand and dirt taken out belonged, a well-known custom by which it belonged to the excavator might be shown. The principle permitting the admissibility of proof of such usages is said to rest on the "presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages."[34]

In addition to the above, proof of usage and custom is admissible to explain words and phrases, as, for instance, in the use of commercial terms. This evidence is admissible under the rules for explaining terms, already discussed, and because "words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. * * * In such cases the evidence neither adds to,

[31] Lassing v. James, 107 Cal. 348.

[32] Anson, Contracts (Huffcut's 2d ed.), p. 328.

[33] 19 Wend. 386 (N. Y.).

[34] Hutton v. Warren, 1 M. & W. 466 (Eng.); Soutier v. Kellerman, 18 Mo. 509, LEADING ILLUSTRATIVE CASES.

nor qualifies, nor contradicts the written contract; it only ascertains it by expounding the language."[35] Thus, where the lessee of a rabbit warren agreed to leave 1000 rabbits on the warren, parol evidence was admissible to show that by the local custom 1000 meant 1200.[36]

In order that a usage may affect a contract, it must meet certain requirements. The usage must not be at variance with a statutory law. Furthermore, the parties may agree that usages shall not enter into the terms of the contract.[37] Again, the usage must have been established sufficiently to become generally known; it must be uniform and certain, continued and accepted.[38] Although the general rule is that the usage must have been known to the parties, this knowledge will be presumed unless it is affirmatively shown that one party lacked this knowledge.[39] Unreasonable or oppressive usages will not be enforced.[40] Neither will words of manifest and clear import be given an unnatural meaning.[41]

Extrinsic evidence in case of mistake. Where an offer has been made through a mistake, or a written agreement is made and through mutual mistake a term of the agreement is contrary to the intention of the parties, it may be shown by parol evidence that the real agreement of the parties was different.[42]

[35] Brown v. Byrne, 3 E. & B. 703 (Eng.).
[36] Smith v. Wilson, 3 B. & A. 728 (Eng.).
[37] Mansfield v. Stoneham, 15 Gray 149 (Mass.).
[38] Dixon v. Dunham, 14 Ill. 324.
[39] Nonotuck Silk Co. v. Fair, 112 Mass. 354.
[40] Raisin v. Clark, 41 Md. 158.
[41] Lawson, Usages and Customs, p. 434.
[42] Anson, Contracts (Huffcut's 2d ed.), p. 329.

Courts of equity will rectify a mutual mistake in a deed or writing, and make the document conform to the true intention of the parties. For this purpose, parol evidence is admissible.[43]

Thus in Webster v. Cecil,[44] A offered to X several plots of land for a round sum. Immediately after he dispatched his offer, he discovered that he had made a mistake in adding up the prices. Consequently, the figure was a lower total sum than he had intended. He informed X of the mistake without delay, but not before X had accepted. In resisting a bill for specific performance of the contract in equity, he was permitted to prove the circumstances under which his offer had been made.

Where the mistake is not mutual, extrinsic evidence is admissible in cases where there is an element of fraud, as where the mistake was caused by the party in whose favor it operated and was known to him before the other party changed his position. Usually in such a case a choice is given to the other party of abiding by a corrected contract or having the contract annulled.[45]

151. **Rules of construction.**—There are general rules of construction which apply after a contract is proven. Necessarily, if there is no ambiguity and no need of construction, the court may not be called upon to construe the contract.[46] On the other hand, in performing their function, courts make use of cer-

[43] Fowler v. Fowler, 4 De G. & J. 250 (Eng.).

[44] 30 Beav. 62 (Eng.).

[45] Anson, Contracts (Huffcut's 2d ed.), p. 330.

[46] Vulcan Iron Works Co. v. Electric Magnetic Gold Mining Co., 99 N. E. 429 (Ill.), LEADING ILLUSTRATIVE CASES.

tain rules to aid in determining the intention of the parties. When ascertained, the intention governs,[47] but courts will not necessarily carry out the intent of the individual parties; rather, they will take the intent which is properly construed from the contract itself.[48]

The first general rule of construction is that words are to be understood in their plain and literal meaning. This rule may lead to consequences the parties did not contemplate. Furthermore, it is subject to the admissibility of evidence of usage.[49] Similarly, technical words are construed in their technical sense.[50]

The next general rule requires that an agreement receive the construction which will best give effect to the intention of the parties. This is the goal of construction; otherwise, the court would be making the contract, rather than the parties.[51]

Finally, the intention of the parties is to be ascertained from the whole instrument.

152. **Same subject—Subsidiary rules.**—There are certain rules subsidiary to the three rules indicated. Thus,

(1) Obvious mistakes in writing and grammar will be corrected by the courts. This rule includes another, namely, that the punctuation of a document, though it may aid in determining the meaning, will not control or change a meaning which is plain from

[47] Farnham v. Thompkins, 171 Ill. 519.
[48] Reed v. Insurance Co., 95 U. S. 23, LEADING ILLUSTRATIVE CASES.
[49] Atkinson v. Truesdell, 127 N. Y. 230.
[50] Peterson v. Brotherhood, 125 Ia. 562.
[51] Ford v. Beech, 11 Q. B. 852 (Eng.); see Wigmore, Evidence, §2462.

a consideration of the whole document and the circumstances.

(2) The court will narrow the meaning of general words by specific and particular descriptions of the subject matter to which they apply.[52] In case of conflict between written and printed words, the written words control.[53]

(3) The court will adopt that meaning of a word which will make the instrument valid.[54] Similarly, where a contract is susceptible of two constructions, one of which will render it unlawful as being in violation of law or contrary to public policy, that construction will be adopted which will render the contract lawful.[55]

(4) If possible, without going contrary to the manifest intention of the parties, a contract will be construed so as to render it reasonable rather than unreasonable.[56]

(5) The court will construe words most strongly against the party who used them. The rule is based on the principle that a man is responsible for ambiguities in his own expressions.[57] Thus, words in an offer are construed most strongly against the offerer.

153. **Rules as to penalties and liquidated damages.** —Where a sum certain is to be paid by A, party of a

[52] Philips v. Barber, 5 B. & A. 161 (Eng.); Stettauer v. Hamlin, 97 Ill. 312.

[53] Sturm v. Boker, 150 U. S. 312.

[54] Anson, Contracts (Huffcut's 2d ed.), § 345; Rankin v. Rankin, 216 Ill. 132.

[55] United States v. Central Pac. R. R. Co., 118 U. S. 235.

[56] Pressed Steel Car Co. v. Eastern Ry. of Minn., 121 Fed. 609; Gillet v. Bank of America, 160 N. Y. 549.

[57] Anson, Contracts (Huffcut's 2d ed.), § 345; American Surety Co. v. Pauly, 170 U. S. 160.

contract, to B, the other party, in the event of the non-performance by A, A and B may have intended thereby either to assess the damages at which they rated the non-performance of the promise, or to secure its performance by imposing a penalty in excess of the loss likely to be sustained. If the court can reasonably construe the provision to be the former, the damages are called "liquidated damages," and may be recovered. If, however, the provision is the second alternative, it is called a penalty. In such event no more than the actual loss sustained may be recovered.[58]

In determining this intention, the courts will not be governed by the name given to the fixed sum mentioned in the contract. If it is liquidated damages, they will enforce it, although erroneously called a penalty. On the other hand, if it is in the nature of a penalty, they will not allow it to be enforced, although called by the parties "liquidated damages."

If the subject matter of the contract is fixed in value, naturally any sum in excess of that value is a penalty, and will not be enforced. On the other hand, if the value of the subject matter is uncertain, a sum, on the face of the contract, not greatly in excess of the probable damage, will be considered as liquidated damages.[59] It is not considered to be a penalty to agree that the whole debt shall become due upon the non-payment of an instalment.[60]

Courts disfavor forfeitures, and try to construe

[58] Anson, Contracts (Huffcut's 2d ed.), § 347.
[59] Ward v. Building Co., 125 N. Y. 230.
[60] Kemble v. Farren, 6 Bing. (C. P.) 141 (Eng.).

stipulations for liquidated damages as penalties, when the amount on the face of the contract is out of all proportion to the possible loss. The better test is the magnitude of the sum in comparison with the subject matter, and not the intention of the parties.[61]

[61] Dean v. Nelson, 10 Wall. 158 (U. S.).

THE PERFORMANCE OF CONTRACTS

CHAPTER XIII.

PROMISES AND CONDITIONS.

154. **Nature of promises.**—The promise of a party to a contract may be an absolute promise or a conditional promise. He may promise to perform his part of the contract under any and all circumstances, or he may promise to perform it upon a contingency. It becomes necessary, therefore, to ascertain what promises are independent and which are dependent.

"Whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done."[62] When parties create a contract, they intend to produce a certain legal result. Hence, the test as to the nature of their promises is the intention of the parties.

155. **Independent promises.**—Absolute independent promises are wholly unconditional upon performance by the other party. Thus A agreed to raise 500 soldiers and to take them to a port. B agreed to pro-

[62] Morton v. Lamb, 7 Term R. 125 (Eng.); Leake, Contracts (5th ed.), p. 456.

vide transportation and victuals, but failed to perform. He set up the defense to an action by A on the contract that A had not raised the soldiers as promised. On demurrer, this defense was held bad, for the covenants of A and B were distinct and were to be performed independently of one another.[63] Either A or B would have an action for a breach by the other party, regardless of his own promise. But the breach would not discharge the contract.

156. **Dependent promises.**—A dependent promise is subject to a limitation. The modern trend of the decisions is to construe promises as dependent rather than independent. Necessarily, however, parties may provide that the covenants shall be independent.

Thus, where A and B agreed to sell and buy a horse for $100, it will be assumed that A intended to give the horse only in case he received the money at the same time, and that B intended to pay only if he received the horse. Consequently, A could recover on B's promise only by offering to perform his promise.

157. **Conditions.**—Not every promise is a condition. Neither does the same legal result follow a failure to perform a promise as attaches itself to the non-performance of a condition. Thus, A promises to work for B and the latter promises to pay A when the task is completed. If A does not work as he promised, he is liable to B for damages. On the other hand, if A does work, ordinarily he must fully perform before he may recover from B on his promise. If he does not work, he may never sue B on his

[63] Dey v. Dox & Mercer, 9 Wend. 129 (N. Y.).

promise. That is to say, the promise of B is dependent and subject to a condition, to-wit, a prior performance by A. But the promise of A is not subject to a condition.

A condition is a fact or event upon which the parties make the contract depend. It is "a fact or event which must precede some change in the legal relations of two (or more) parties."[64] Although the fact or event must be uncertain, it is sufficient if that uncertainty exists in the minds of the parties. Ordinarily, the fact or event must be future as well as uncertain.[65] A past or present event may, however, be a condition if it is unknown or uncertain in the minds of the parties. The same public policy that upholds the validity of the compromise of an unfounded but honestly entertained claim will uphold such a condition.

Distinctions. A distinction should be noted between conditions which relate to the very existence of a contract and those which relate to the performance of an existing contract.[66] Thus, the happening of a contingency may be necessary before there can even be any contract. Such conditions may be imposed by law or prescribed by the parties. For example, the law requires that there be a consideration before an action may be brought on an unsealed agreement.

But it is frequently difficult to determine whether a condition prescribed by the parties is to precede the existence of the contract or whether the contract is

[64] Harriman, Contracts (2d ed.), § 299.
[65] Langdell, Summary of Contracts, § 26.
[66] Costigan, Performance of Contracts, pp. 1-6.

in existence and subject to termination by the happening of the fact or event. This determination is sometimes necessary for the purposes of pleading and proof. But even then, the cases furnish anomalies. The discussion in the following chapters is concerned primarily with the performance of contracts which actually exist.

Kinds of conditions. As created, conditions are expressed, implied in fact, and implied by law. In their nature and effect, conditions may be precedent, concurrent, or subsequent.

158. **Express conditions.**—An express condition is one stated or written out by the parties of the contract in explicit and express terms. It is not necessary in order to have an express condition that words of condition be used. It is sufficient if on a fair construction of the contract it is determined that the parties actually expressed an intention to attach a condition to the promise, for such expressed intention is the foundation for conditions of this class.

Where A agrees to write a book for B, and B agrees to pay A for his services, on condition that the work is completed by a set time, the condition on which the payment by B depends is expressed.

159. **Conditions implied in fact.**—A condition implied in fact is not expressed in the agreement or the promise. But because a compliance with such a condition is necessary to the performance of that which is expressed in the contract and to carry out what the parties agreed upon, it is implied because it must have been intended by the parties.

For example, a promise by B to perform work

under the direction of a surveyor carries with it a condition implied in fact that a surveyor be appointed.[67] Similarly, if A agrees to manufacture goods in assorted sizes as ordered by the buyer, it is a condition implied in fact that the latter order the sizes wanted. Performance is excused until he does so.[68] "Where circumstances left uncertain by the contract are of such a nature that one party cannot perform his part of the contract until they are fixed, the other party, insisting on the contract, ought to fix those particulars."[69] For all practical purposes, conditions implied in fact are to be treated in the same manner as express conditions. The analogy to these terms, express and implied in fact conditions, is to be found in the use of the terms, express contracts and contracts implied in fact.

160. **Conditions implied in law.**—A condition which is implied in law is one which is neither expressed nor intended by the parties so as to become even a condition implied in fact. Conditions implied in law are supplied by the courts in the interests of fair dealing and to meet the needs of justice,[70] although a few authorities hold that the basis for their existence is the implied intention of the parties.[71] Such conditions are in the nature of equitable defenses based upon non-performance by the party who breaks the condition. Undoubtedly, they result from the application of equitable principles, but since, his-

[67] Coombe v. Green, 11 M. & W. 480 (Eng.).
[68] Ault v. Dustin, 100 Tenn. 366.
[69] Coleridge, Jr., in Armitage v. Insole, 14 Q. B. 728 (Eng.).
[70] Costigan, Performance of Contracts, pp. 7, 8.
[71] Harriman, Contracts (2d ed.), §§ 315, 318.

torically, they have been treated as conditions, it is difficult to depart from that method.

Thus, express conditions and conditions implied in fact are true conditions. They apply to unilateral as well as bilateral contracts. Conditions implied by law apply only to bilateral contracts.

161. **Performance of express and implied conditions.**—In the mode of performance, conditions expressed and implied in fact require strict performance. But a condition implied in law need only be performed substantially. Only a material breach of such a condition by one party to the contract will excuse performance by the other. Consequently, being more just, where doubt exists as to what a condition should be deemed, it is to be regarded as a condition implied in law rather than as one implied in fact.[72]

162. **Precedent conditions.**—A condition precedent is an act or event which must be performed by one party or exist before any obligation arises upon the other party to perform. Any fact or event which is capable of being a condition of any kind may be a condition precedent, but generally the fact or event consists of some act to be done by the promisee. Where A agrees to perform work for B, for which B is not to pay until A completes his service, performance by A is necessary before he may claim any payment under the contract. B may not be called upon to fulfill his promise until the condition precedent, i. e., the performance of the work, is completed. The promise of A is independent and abso-

[72] Costigan, Performance of Contracts, p. 10.

lute, whereas the promise of B is dependent on and subject to a condition precedent.

The distinction between conditions expressed, implied in fact, and implied by law applies to precedent conditions.

163. **Conditions concurrent.**—Conditions are concurrent where the liability to perform on one side is dependent upon the simultaneous performance on the other side. Such conditions are also known as mutually dependent conditions.[73] The act which must precede liability on each side is tender of performance on the other side. If A agrees to sell B a horse and B agrees to pay $100 for the animal, and if A desires performance, he must tender the horse to B. If B desires performance, he must tender the money to A. There are two things to be done, each is a condition of the other, and they must be performed concurrently.[74]

Concurrent conditions may be express, implied in fact, or implied by law. The greater number of such conditions are of the last class, for wherever possible concurrent conditions are implied by law upon the general ground that the performance on one side of the contract is intended to be in exchange for the performance on the other.

Concurrent conditions protect both parties, for they

[73] Langdell, Summary of Contracts, § 105.

[74] Some writers take the view that conditions concurrent are only a species of condition precedent, since "an offer to perform the act called a condition concurrent" is necessary to put the other party in default. See Harriman, Contracts (2d ed.), § 303; 14 Yale Law Journal 424. In conditions precedent, however, actual performance must be proved, whereas in conditions concurrent, tender of performance is sufficient. It is convenient to separate such cases.

do not require either party to trust the other. There are certain requirements, however, which must be satisfied before such conditions are possible and appropriate. Thus, the promise of each party must be capable of performance in a moment of time; otherwise, it would not be possible for them to be performed concurrently. Secondly, the object of the promises must be the exchange of some property or right for some other property or right. Thirdly, this exchange must be between the parties; otherwise, in legal contemplation it cannot be made in an instant of time.

Thus, mutual promises between A and B that A shall give to B and B shall give to C will not be made mutual covenants, unless by express arrangement. In the fourth place, the promises must be capable of performance at the same time; otherwise, they will violate the first rule.[75]

164. **Conditions subsequent.**—A condition is subsequent where an existing liability to perform is to be determined or put an end to by some act or event. Here the liability has already accrued, but is discharged by the performance of a condition subsequent, which is any fact or event that will relieve the promisor from a default under the contract. In a bond, if A promises to pay B $1,000, and it is provided that if A faithfully performs his services then the bond is to be void, A is under an existing liability to pay a sum to B. But upon his faithful performance of the duties the liability is determined. In short, the fact of A's faithful performance relieves

[75] Langdell, Summary of Contracts, § 133.

him from the cause of action on the bond. This is the condition subsequent.

In the law of contracts, but not in the law of real property, courts imply, wherever possible, conditions concurrent as between conditions concurrent and precedent; and conditions precedent as between conditions precedent and subsequent.[76]

Subsequent conditions that are really such are rarely found. The way to test a condition subsequent in form to see if it is subsequent in reality is to try to put it in precedent or concurrent form. If this can be done, and the intention of the parties can nevertheless be fulfilled, the condition is not a genuine condition subsequent.

The rule is generally stated to be that subsequent conditions may only be express conditions.[77] But in the case where a contract provides for payment by instalments, due at different times, the instalments may be successively sued on as they become payable. Each action, however, should include every instalment due.[78] At each breach a cause of action arises, but in order that the party in default may not be vexed by unnecessary separate actions the law annexes to each cause of action, as it comes into existence, a condition to the effect that if a subsequent cause of action for a breach of the same contract arises and is prosecuted to judgment in an action in which the earlier cause of action, not previously sued

[76] In the case of certain contracts, however, such as fire insurance policies, the courts favor treating the conditions as subsequent. Costigan, Performance of Contracts, p. 26.

[77] Anson, Contracts (Huffcut's 2d ed.), § 382.

[78] Seed v. Johnston, 63 N. Y. App. Div. 340, 343.

upon, is not joined, the earlier cause of action shall thereupon terminate.[79]

Thus, A agrees to buy of and pay B for an order of goods as follows: $500 on February 1st, $800 on April 1st, and $1,000 on June 1st. A defaults on the first payment. B may sue at once for $500 or he may wait until the April payment is also in default and sue for $1,300. But if B sues for $800 without previously having sued for the $500 instalment, the cause of action for the latter will terminate. It is this condition of combining prior instalments which is believed to be subsequent.

165. **Pleading and proof.**—In pleading the plaintiff must allege actual performance of a condition precedent. Moreover, he must prove that allegation at the trial. Thus, where A agrees to write an article for B before he is to receive payment therefor, he must allege in his claim and prove at the trial that he actually wrote and tendered the article before he may obtain a judgment against B for the contract price.[80]

Where there are concurrent conditions, the plaintiff must plead an offer to perform and a refusal by the other party. He must show his readiness and ability to perform. In the contract between A and B for the sale and purchase of a horse, if A is suing B, he must allege that he offered the horse to B, and is willing and ready to sell the animal before he may recover. If B sues A, he must allege that he offered

[79] Costigan, Performance of Contracts, p. 19.

[80] Langdell, Summary of Contracts, § 30; Harriman, Contracts (2d ed.), § 337.

the money to A, and is willing and ready to pay for the horse.[81]

In conditions subsequent, the burden is generally on the defendant and he must plead and prove actual performance. In the case of a bond with a condition, whereby A promises to pay B $1,000 subject to the condition that if A does certain work faithfully the bond is void, if B sues A, then to defeat the action A must allege and prove that he did his work faithfully.

Although the cases as to the burden of proof relating to actions on bonds are not uniform and the law is not settled,[82] the rules as to conditions in insurance cases seem to be generally followed. Thus, while the plaintiff is required to allege performance of conditions precedent, yet the defendant has the burden of proving the facts constituting any alleged breach of the contract.

This is based on the rule, now generally recognized, that in order to raise an issue on the plaintiff's general allegation of performance, the defendant must particularly allege the breach. This seems to be the rule for insurance cases whether the breach complained of is that of a condition precedent or subsequent. Thus, the defendant must prove such breaches

[81] Costigan, Performance of Contracts, pp. 19-25, 35. The evidence by which this offer can be shown is another matter. A request or a notice may be sufficient indication to the defendant that the plaintiff not only wishes the defendant to perform but is himself ready to perform. Certainly a formal tender either of goods or money is not necessary, but in the absence of any legal excuse, some notification that in effect amounts to an offer to perform, coupled with an immediate ability to perform, seems requisite, both on principle and authority, in order to give the plaintiff a right of action. Williston, Sales (2d ed.), 448.

[82] Moody v. Insurance Co., 52 Ohio St. 12.

as a vacancy of the premises in violation of the policy.[88]

166. **Representations and warranties.**—A representation is a statement of some matter or circumstance relating to the contract and which either in part or altogether induces its formation by the parties. The representation may be either expressed or implied by conduct, and may be made before or at the time of the making of the contract. Representations which do not form a part of the contract are either immaterial or in the nature of conditions going to the existence of the contract. Hence they do not enter into the question of the performance of conditions in existing contracts. In turn representations which are embodied in the contract may be merely representations, or conditions as well. If the latter, it may be as to either a material or an immaterial matter. Furthermore, a material representation may amount to a warranty.

Ordinarily, a warranty is a contract collateral to a legal transaction and by which a party thereto undertakes or promises that certain facts are or shall be as he represents them. A breach of warranty gives rise to a claim for damages in contract, and the untruth alone of the warranty is sufficient for a cause of action. But in a suit on a representation, the plaintiff must prove that the representation was made fraudulently or recklessly in known ignorance of the facts.

Unfortunately, the term "warranty" is used in a variety of senses. It is used in the law of real prop-

[88] Moody v. Insurance Co., 52 Ohio St. 12.

erty, where, however, it does not have the sense of a condition.[84] As used in a sale of personal property in some jurisdictions, it is a collateral statement or representation to the contract of sale having reference to the character of, the quality of, or the title to, the goods sold, and by which the warrantor promises or undertakes that certain facts are or shall be as he represents them. Such a warranty is not a condition. But in other jurisdictions, the collateral promise conception is ignored and such a material promise is made a condition. In such courts, if the condition is broken the buyer may repudiate or rescind the contract.[85]

In cases of insurance policies and charter parties the term warranty usually does not have the meaning of a collateral promise, but means that the thing warranted is a condition. In such contracts, it is a representation or promise which is so essential a part of the contract that its truth or performance is a condition precedent to the other party's liability to perform.[86]

In such cases the terms "warranty" and "condition" are often confused and used interchangeably. The distinction, however, is clear. In speaking of a representation by A to B, as a warranty, that representation is considered with reference to A's obligation, but when the same representation is regarded

[84] Costigan, Performance of Contracts, p. 29.

[85] Williston, Sales (2d ed.), 608, 181; Uniform Sales Act, § 12, 69.

[86] Insurance and charter party contracts are governed by the law merchant and hence taken largely from the Roman Law, which states that the obligation of a contract is to do what good faith demands. The common law conception, however, as applied to other contracts, is to do what the parties intended. Ollive v. Booker, 1 Exch. 416 (Eng.).

as a condition, the effect of that representation on B's obligation is the question concerned.[87]

Whether a representation or promise in a policy of insurance or a charter party is also a warranty depends on whether the parties have expressedly, or by unexpressed intention gathered from the whole contract, made the validity of, or liability under, the contract dependent on the truth or the performance of such representation or promise. A fair construction of the contract as a whole is the determining element, and no particular form of words is alone conclusive. This is true even if the word "warrant" appears.[88] In cases of doubt, the policy is construed in favor of the insured, and the statements made by the applicant for the insurance, for instance, will be held as representations merely. But a guaranty of the truth of a representation which forms a part of the contract is a condition precedent to recovery in the law of insurance and of charter parties.[89] This condition precedent, however, differs from an ordinary condition precedent in that the defendant must allege and has the burden of proving its falsity or breach, as indicated in a prior section.

When used in reference to statements or promises in general mercantile contracts, the word warranty is properly used only as to that which is a condition. Thus, in the contract of a merchant, a statement

[87] Harriman, Contracts (2d ed.), § 311.

[88] Globe Mutual Life Insurance Association v. Wagner, 188 Ill. 133.

[89] McClain v. Provident Co., 110 Fed. 80. By statutes in a number of the states no misrepresentation or warranty will defeat recovery on an insurance policy unless the misrepresentation is made with actual intent to deceive or the matter misrepresented is material to the risk. See subject, INSURANCE.

descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.[90]

[90] Norrington v. Wright, 115 U. S. 188.

CHAPTER XIV.

RULES ON CONDITIONS.

167. **History of conditions.**—Originally in the common law there were no conditions except express ones. This seems to have remained true until after simple bilateral contracts were enforced. But as justice demanded the finding of conditions, the courts would scrutinize contracts under seal containing mutual covenants for express conditions, and they did so even before simple bilateral contracts were recognized. "This gave great importance to the precise terms in which mutual covenants were expressed, and it not infrequently happened that a single word turned the scale. Thus, if A covenanted with B to give or do something for something else which B covenanted to give or do in return, it was commonly held that the word 'for' made A's covenant dependent upon B's."[91] This undue emphasis on such a word as "for" as importing an express condition was the result of the feeling of the judges that performance should be conditional on performance at a time when the judges had not yet reached the conception of conditions as capable of implication. Later,[92] in 1773, it was held that the dependency of one covenant upon another would be implied so as to create a condition precedent by implication. In 1792, con-

[91] Langdell, Summary of Contracts, § 140.
[92] Same.

current conditions were implied in a case, since which time the doctrine of mutual dependency has been established.[93]

168. **Rules on express conditions.**—Express conditions may exist both in bilateral and unilateral contracts, and it is immaterial whether or not there are also implied conditions in the same contract. Courts construe the language of an express condition, wherever possible, in such a way as not to work an unjust forfeiture or oppression. For instance, in insurance contracts, the courts will go far in construction to help out the insured. "Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which the courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurer."[94]

Wherever it is doubtful whether certain words do or do not constitute an express condition, Professor Langdell lays down the rule that it is then material to inquire whether they constitute a promise, for if they do not, that will be an argument in favor of their being a condition, "it being a cardinal rule of interpretation to give effect in some way to all the words of a contract, if it be possible."[95]

Although some matter is apparently of very little

[93] Goodison v. Nunn, 4 T. R. 761 (Eng.); Langdell, Summary of Contracts, § 133.

[94] Taft, J., in Manufacturers' Accident Indemnity Co. v. Dorgan, 58 Fed. 945, 956; Langdell, Summary of Contracts, § 33, and rule 2 on Express Conditions.

[95] Langdell, Summary of Contracts, rule 4 on Express Conditions.

importance, the parties may consider it essential. Consequently, if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be one. On the other hand, they may think that the performance of some matter, which is apparently of essential importance and prima facie a condition precedent, is not really vital and may be compensated for in damages, and if they sufficiently expressed that intention, it will not be a condition precedent.[96] Similarly, the intention of the parties determines whether or not the word or clause in which an express condition is found is also a covenant or promise.

An express condition may be waived. Thus, if after a breach of a condition by A, B chooses to go on with the contract, he thereby waives the breach as a breach of condition. But he may sue for damages for the breach of the contract unless the breach of contract is also waived. Whether or not this is the case, is a question of fact in each case. Where A agrees to deliver 10,000 boxes, of which 4,900 were not in accordance with the contract, B is allowed to recover in damages for the failure to perform literally although he waived the breach of condition. Some jurisdictions hold, however, that in contracts of sale the buyer's acceptance of goods not only waives the non-performance of the condition but also any right to damages for defective quality or for delay in performance.[97]

[96] Bettini v. Gye, 1 Q. B. D. 183 (Eng.); Adams v. Guyandotte Valley R. Co., 64 W. Va. 181.

[97] Langdell, Summary of Contracts, rule 11 on Implied Conditions, and rule 1 on Express Conditions; Williston, Sales (2d ed.), §§ 485, 487, 489.

169. **Performance dependent on approval.**—Frequently building contracts contain an express provision providing that the contractor is to receive the agreed price only upon the approval by an architect of the work done. The decisions in reference to such certificates are not harmonious. Ordinarily, the judgment or estimate of such third party is binding on the parties to the contract and the express condition must be literally complied with.[98] But everywhere it is held that the fraudulent collusion of one party with the architect will excuse the non-performance of the express condition.[99] In the United States, the fraud of the architect or his refusal to exercise an honest judgment, even if done without collusion, excuses a failure to produce the certificate.[1]

But if the promise is made merely upon the will of the promisor, a mere voluntary obligation arises. Thus, to agree to furnish lumber in such quantities as one may "deem fit and advisable" is to promise to furnish nothing. The promisor may cease furnishing the lumber whenever he pleases.

170. **Contracts conditional upon satisfaction.**—Performance of a contract may depend upon the

[98] Bush v. Jones, 144 Fed. 942.

[99] Batterybury v. Vyse, 2 H. & C. 42 (Eng.).

[1] In New York it seems that the court may disregard the express condition precedent and substitute its judgment or that of the jury for that of the architect if the defects for which the architect refuses to certify seem trivial. This doctrine must not be confused with the rule that in the absence of express conditions a substantial performance of a building contract entitles the contractor to recover the purchase price less proper deductions for the unperformed part. Nolan v. Whitney, 88 N. Y. 648; Keeler v. Herr, 157 Ill. 57. The latter doctrine is one of conditions implied by law in the absence of express conditions. Handy v. Bliss, 204 Mass. 513. See Clarke v. Watson, 18 C. B. (N. S.) 278 (Eng.).

personal satisfaction of one of the parties. Thus, A may agree to paint a portrait of B to B's personal satisfaction. In such a case, A will not recover for his services until B is in fact satisfied. The fact that B is unusually critical is immaterial, since A agreed to take the risk of B's approval.[2] It is not sufficient that others are satisfied.

Similarly, a condition which gives an employer the right to discharge the employee if he considers him incompetent, is a bar to an action for breach of contract. The rules apply to personal taste in mechanical matters as well.[3] The promisor must, however, act honestly and in good faith: his dissatisfaction must be actual and not be feigned. In matters not involving personal taste or comfort, the courts construe the condition as one requiring the satisfaction of a reasonable man. Such are contracts for material and work.[4]

Thus, where A tells B that he may return the goods he has purchased unless he is satisfied, if the article is one involving personal taste, as a bookcase or an organ, B may return the article if he is dissatisfied. Even if the matter is not a matter of personal taste, where B is made the sole judge, the articles may be returned where the seller can be placed in status quo. But in cases not involving personal taste, even where B is to be satisfied, the courts are particularly careful in requiring at least genuine dissatisfaction, and sometimes adopt the rule of reasonable satisfaction.

[2] Gibson v. Carnage, 39 Mich. 49; Brown v. Foster, 113 Mass. 136.

[3] Harder v. Marion Co., 97 Ind. 455.

[4] Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387; Tobin v. Kells, 93 N. E. 596 (Mass.).

171. **Promises to pay.**—Where A promises B to pay him when he is able, the courts interpret the promise reasonably. If the promisor once becomes able to pay, the condition disappears and his promise becomes absolute. His subsequent inability will not restore the condition.[5] On the one hand, such promises do not imply ability to pay without embarrassment, or even without crippling the debtor's business. On the other hand, ability to pay cannot be gathered from the fact that the debtor may be in possession of property sufficient to pay the particular debt. If he is plainly insolvent, or if an enforced payment would strip him of practically all means of support, the debtor is not to be considered as being able to pay.[6]

172. **Rules on conditions implied in fact.**—Conditions implied in fact are for all practical purposes express conditions and are governed by the same general rules. Thus, if performance by A is conditional upon the happening of an uncertain event, knowledge of which is peculiarly within the possession of B, it is a condition precedent to liability on A's part to perform that B notify him that the event has happened.

In Hayden v. Bradley,[7] A rented property from B, who agreed to keep it in repair. A was not permitted to recover from B for failure to repair because he had not first notified B that the property needed attention. B was not in a position to know of such

[5] Work v. Beach, 13 N. Y. Supp. 678; Denney & Co. v. Wheelwright Co., 60 Miss. 733.

[6] Tebo v. Robinson, 100 N. Y. 27.

[7] 6 Gray 425 (Mass.).

defects and performance on his part was conditional upon notice.

But if A agrees with B to pay B a sum of money when C leaves for Europe, if both have equal opportunities to know of C's departure, B can recover from A without giving him notice.

The rule is as laid down in Vyse v. Wakefield:[8] "Where a party stipulates to do a thing in a certain specific event, which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him." Of course, the parties may expressly provide that notice or demand is necessary to impose a liability to perform on one party. Such an express condition must be performed in order to charge the latter. It need not be in writing, unless the contract so provides.[9]

173. **Rules on conditions implied in law.**—Where the parties fail to provide a condition which fair dealing requires, the law will imply conditions in the interest of justice. Thus, in every bilateral contract, the promises on the one side are presumed to be the equivalent for all the promises on the other side. Consequently, they are prima facie subject to the implied condition that performance on one side is conditional on a concurrent performance on the other side.

In other words, the two sides of every purely bilat-

[8] 6 M. & W. 442 (Eng.).
[9] Dunn v. Marston, 34 Me. 379.

eral contract, being the equivalent for each other, constitute prima facie mutual and concurrent conditions.

Thus, where each side of a bilateral contract is put into a separate instrument, complete in itself and not referring to the other side, each side will nevertheless be dependent upon the other, if that would be the case if both sides had been incorporated in the same instrument.[10]

In the ordinary case of unilateral contracts, no possibility of conditions being implied by law would seem to exist. But in the case of an option whereby for $50 paid by B to A, A promises in writing to convey a tract of land to B if he pays A $5,000 in sixty days, but B promises nothing, it is possible that the law implies a condition that the deed shall be exchanged for the $5,000 simultaneously.[11]

It makes no difference, however, whether the contract is a specialty or is not under seal, nor is it any objection that the consideration of the promise on each side is the promise and not the performance on the other side. The most common instances of contracts where the two sides of the contract constitute mutual and concurrent conditions, are contracts for the sale of real and personal property.

174. **Act on one side requiring time.**—Certain distinctions must be borne in mind, for the rule laid down is very general and only holds prima facie. If the promise on the one side is to do specific acts which

[10] Hunt v. Livermore, 5 Pick. 395 (Mass.); contra, Moggridge v. Jones, 14 East. 486 (Eng.).

[11] Costigan, Performance of Contracts, p. 61.

require time for their performance, while the covenant or promise on the other side is simply to pay money, the specific acts must be fully performed before the money is payable. Such promises are not concurrent. Thus, if instead of an agreement whereby A agrees to write an article for B by January 1, 1914, and B agrees to pay him $100 for it when it is completed, the contract is simply that A agrees to write an article for B for $100, it is a condition implied in law that A complete the article before he demand payment of B. The two sides of this contract do not constitute mutual and concurrent conditions. B's promise to pay is subject to a condition precedent which is the completion of A's article. A's promise is absolute and unconditional. The most common instances of contracts of this description are ordinary contracts for service, building contracts, and charter parties. If A covenants to work for a year and B covenants to pay him $2,000, the work must be performed before the money need be paid. The work is a condition precedent.[12]

175. **Where only the time for performance of one act is definite.**—If the promise of A is to do specific acts requiring time for their performance (the time being indefinite), while the promise of B is simply to pay money at a fixed time, both sides of the contract are considered independent and absolute. This is true whether the time of A's performance be before or after the money becomes payable, or partly before and partly afterward. Thus, if A is to obtain ten salesmen for B, for which service B is to pay the

[12] Costigan, Performance of Contracts, p. 47.

sum of $50 on June 1, 1914, A may recover that sum on that date without having performed.

This is qualified by the rule that a condition will be implied that if prior to the time fixed for B to pay, A repudiates the contract or makes the performance impossible, or becomes insolvent, or otherwise makes it certain that he cannot perform, payment by B will be excused. Likewise, if the expectation was that performance was to be complete before the time fixed for payment, and performance was after that time, the time for payment was extended. In such a case, one would be a condition of the other.[13]

Rule as to property. But if a day is fixed for payment in an agreement for the sale of any property, but nothing is said as to the time of delivering the deed or the chattel, the latter is deliverable when the money is payable. Thus, if A agrees to sell B his land for $5,000, and B agrees to pay that sum on January 3, 1914, the deed must be delivered on that date before A may sue for the money. The effect will be the same as if the same day had been expressly fixed for the payment of the money and the delivery of the deed. The two sides of the contract under this rule will be mutual and concurrent conditions.[14]

176. **Breach of condition.**—Two sorts of breaches may occur: (1) *in limine,* that is at the outset; and (2) after a part performance of the contract. If a breach of condition occurs before there is any performance, it is a breach *in limine,* and discharges the

[13] Langdell, Summary of Contracts, rule 5 on Implied Conditions; Costigan, Performance of Contracts, pp. 48, 49.

[14] See Skillman Hardware Co. v. Davis, 53 N. J. L. 144; 14 Yale L. J. 424.

contract, provided it is not a trifling or merely formal breach.[15] Inasmuch as the law implies that each party shall be in a position to perform literally, such a breach *in limine* by the plaintiff constitutes a defense for the defendant. A trifling breach by A, although it may not justify non-performance, may nevertheless give rise to an action in favor of B for damages for breach of contract.

To constitute an excuse for non-performance a breach after part performance must be substantial, for the law will not imply a breach. There must be something more than a mere breach to indicate that the party is not going on with his agreement and that he is not merely failing to perform one element. A less breach will justify non-performance by B if the breach is *in limine* than if it takes place after part performance. To justify non-performance in the latter event, the breach must go to the substance, essence or root of the contract. It must defeat the main scope of the agreement.[16] Thus, the temporary illness of an employee which does not go to the root of the contract will not prevent him from enforcing the contract; but if the illness makes it necessary to obtain a substitute who cannot, however, be engaged except for the full period of service of the sick employee, the illness goes to the root of the contract. The employer is discharged from further liability on the contract.[17]

177. **Rules as to time.**—When the contract fixes

[15] Bettini v. Gye, 1 Q. B. D. 183 (Eng.).
[16] Kauffman v. Raeder, 108 Fed. 171; Harriman, Contracts (2d ed.), § 516.
[17] Poussard v. Spiers, 1 Q. B. D. 410 (Eng.); Leopold v. Salkey, 89 Ill. 412.

no time for performance, the contract is construed as allowing a reasonable time. Where A and B contract for the sale of A's horse for $100, the contract must be performed within a reasonable length of time. What constitutes a reasonable time depends upon the circumstances of each case. The difficulties, hazards and the amount of diligence used should be considered.[18] The decisions are by no means uniform as to whether the question is one for the court or the jury. It would seem that what is a reasonable time in which a contract must be performed is a matter of law for the court when it depends upon construction, whereas it is a question of fact for the jury when there are matters in dispute or the question depends on facts extrinsic to the contract.

When a contract fixes a time for performance, and the parties agree that time is to be made of the essence, nothing short of performance on time is a discharge.[19] Time may be expressly made of the essence, or it may be construed as such when time is a material object of the contract. Thus, in McClellan v. Coffin,[20] a contract was made to "furnish the work within three years, or the note to be void." It was held that time was material, and that the failure of the party to finish the work within the time specified relieved the other party. Of course, the provision may be waived. But in the absence of assent by the other party, performance after the time fixed does not discharge the contract.[21] Not

[18] Goodall v. Streeter, 16 N. H. 97.
[19] Miller v. Phillips, 31 Pa. St. 218.
[20] 93 Ind. 456.
[21] Underwood v. Wolf, 131 Ill. 425.

only as to the day, but as to the hour, may the parties agree that time shall be of the essence.[22]

At common law, time was always of the essence. But courts of equity, by their own rules, and by their influence on the principles of the courts of law, have softened the iron-bound rule. The intention of the parties is determined to learn whether performance actually depended on a day certain, or whether a time was merely set to secure performance within a reasonable time. Generally, however, time is of the essence in mercantile contracts;[23] but in land contracts, as well as for services, and building construction, generally time is not of the essence.[24] The parties may, however, as stated, make time of the essence, and both law and equity will then enforce the provision.

A contract to be performed "as soon as possible," "when convenient," etc., requires performance within a reasonable time.[25] In computing time, as where performance must take place within ten days after date, the date of execution is excluded.[26] Similarly, performance on a day certain permits the whole of that day in which to perform.[27]

178. **Instalment contracts.**—Wherever there is a contract for delivery by instalments, and no time is fixed, payment is to be made upon each delivery,[28]

[22] Shinn v. Roberts, 20 N. J. L. 435.

[23] Norrington v. Wright, 115 U. S. 188.

[24] Cleveland Rolling Mill v. Rhodes, 121 U. S. 255; Derrett v. Bowman, 61 Md. 526.

[25] Florence Gas, etc., Co. v. Hanby, 101 Ala. 15.

[26] Shelton v. Gillet, 79 Mich. 173.

[27] Massie v. Belford, 68 Ill. 290.

[28] Withers v. Reynolds, 2 B. & A. 882 (Eng.).

for the law will imply concurrent conditions wherever possible.

But where a lump sum is mentioned and no time is fixed, the payment and last instalment would be concurrent. All of the preceding instalments would be independent. If the seller of a piece of property waits until all instalments are due, he must tender the deed to the buyer, because then it is possible to make the conditions concurrent. At any time, however, up to the time when the third payment is due, he can sue for the second instalment without tendering the deed.

The general American rule excuses further performance of a divisible contract where the breach has gone to the essence. The tendency is to hold that non-performance of one instalment will justify a refusal to proceed with the rest of the contract. A agreed to deliver to B 600 tons of iron during three months in equal portions to-wit: 200 in June, 200 in July and 200 in August. A actually delivered 20 tons in June and 21 tons in July. Here there is a contract for instalments which themselves are split into units. In the United States, each instalment is regarded as a unit, and if it is not fully performed, it is a breach *in limine*.[29] But English courts regard this as a breach after part performance, and consequently no excuse for non-performance by the other party.[30]

Defective quality does not generally seem to excuse future performance of accepting the remaining in-

[29] Rugg v. Moore, 110 Pa. St. 236; Williston, Sales (2d ed.), § 467.
[30] Freeth v. Burr, L. R. 9 C. P. 208 (Eng.).

stalments, unless they are also of poor quality, although a contrary doctrine also exists.[31]

179. **Renunciation of contract.**—If A agrees to convey a tract of land to B on January second, and fails to do so on that date, B would have a right of action immediately. But if in the October preceding A had announced that he would not convey, the problem is whether B may sue him at once, or whether he must wait until the time for performance arrives. Before B changes his position, however, A may generally repent and withdraw his repudiation even against B's protests.[32]

Renunciation before performance. Parties to a contract which is wholly executory have a right to the maintenance of the contractual relation up to the time of performance, as well as to a performance when it is due. Therefore, if A renounces his obligations before such a time, B, if he so desires, is excused from performing his obligations. Moreover, the general rule permits B to sue A at once for the breach. He need not wait until the time set for performance arrives.[33]

In the case of Frost v. Knight,[34] A promised to marry B upon his father's death. While his father still lived, A renounced the contract. B was permitted to sue at once. "The promisee," said the court, "has an inchoate right to the performance of the

[31] Cahen v. Platt, 69 N. Y. 348; Fullan v. Wright & Colton Co., 196 Mass. 474.

[32] Traver v. Halsted, 23 Wend. 66 (N. Y.).

[33] Windmuller v. Pope, 107 N. Y. 674, LEADING ILLUSTRATIVE CASES. Contra, Daniels v. Newton, 114 Mass. 530.

[34] L. R. 7 Exch. 111, 114 (Eng.).

bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract."

In a leading English case[35] A engaged B to enter his service in June, but notified him in May not to come. He was held liable in an action by B, although suit was brought before the time for performance had arrived. The court based its decision on the ground that a relation is created between the parties by the contract which the parties impliedly promise not to prejudice.[36]

There are certain requirements, however, which must be satisfied in order to apply this rule. Thus, the renunciation must cover the entire performance to which the contract binds the promisor.[37] A partial renunciation does not confer an immediate right of action. In the case of Johnstone v. Milling,[38] the landlord agreed among other things to repair the premises at a certain time. Before that time arrived, he repudiated this particular covenant. The tenant sued for damages at once. It was held that the contract was the whole lease and that the anticipatory breach of one covenant did not entitle the tenant to sue at once.

Furthermore, there must be no question but that it is a renunciation, for a mere expression of an intention not to perform is insufficient.[39] Finally,

[35] Hochster v. De La Tour, 2 E. & B. 678 (Eng.).
[36] See Roehm v. Horst, 178 U. S. 1.
[37] Anson, Contracts (Huffcut's 2d ed.), § 362.
[38] 16 Q. B. D. 460 (Eng.).
[39] See Dingley v. Oler, 117 U. S. 490.

the rules as to anticipatory breach apply only to bilateral contracts.[40]

If B, after A announces his renunciation, chooses not to regard it as an anticipatory breach, and continues to insist on performance, the contract is not discharged. It remains in existence for the benefit of both parties.[41] Consequently, where the renunciation is not accepted, the promisor is again entitled to any defense that may arise. In Avery v. Bowden,[42] A agreed that his ship sail to Odessa and there take on a cargo from X's agent, to be loaded within a set time. X's agent refused to supply a cargo. A was then entitled to treat the refusal as a breach. Instead, the number of days not having expired, the master of the ship continued to demand performance. Then, still within the time limit of the contract, a war broke out. Thereby performance became legally impossible, and when A sued for breach of contract because of the agent's refusal, the court held that the renunciation not having been accepted, and the time limit not having expired, X was entitled to exoneration because of the war.

Although the parties may not increase the damages by attempted performance,[43] neither may the renouncing party force the other to sue for breach before the day fixed for performance.[44] The cases

[40] Lawson, Contracts, § 440.

[41] John A. Roebling's Sons' Co. v. Lock Stitch Fence Co., 130 Ill. 660.

[42] 5 E. & B. 714 (Eng.).

[43] Clark v. Marsiglia, 1 Denio 317 (N. Y.), LEADING ILLUSTRATIVE CASES.

[44] John A. Roebling's Sons' Co. v. Lock Stitch Fence Co., 130 Ill. 660; Kadish v. Young, 108 Ill. 170. The general rule in damages is that if A who is building a table for B is notified B will not take the table, A must stop work in order to reduce the damages. See subject, DAMAGES.

are not of one accord in deciding the problem of damages.

Renunciation during performance. Renunciation by one party in the course of performance discharges the other party from a continued performance of his promise. The latter can sue at once in a contract action for the breach, or he may recover under the rules of quasi-contracts.[45]

This rule is frequently illustrated in contracts of sale. A contracted with the B company to supply them with a certain number of railway chairs to be delivered in certain quantities at specified dates. After there was a part performance of the contract, B company notified A to deliver no more chairs. He brought an action for breach of contract and averred his readiness and willingness to perform the remainder of the contract. The B company argued that in addition thereto, he must prove an actual delivery. The court held that where a contract was renounced by one party, the other need only show that he was willing to perform his part. "When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, main-

[45] See subject, QUASI-CONTRACTS; Hale v. Trout, 35 Cal. 229; Anson, Contracts (Huffcut's 2d ed.), § 379.

tain an action against the purchaser for breach of contract."[46]

Abandonment in instalment contracts. Where, for instance, the plaintiff merely fails to pay for any particular load of straw, that of itself need not be an excuse for not delivering more straw, but where the plaintiff expressly refuses to pay for the loads to be delivered, the defendant is not liable for ceasing to perform his part of the contract.[47]

If two of four instalments have been delivered and the buyer becomes insolvent, the courts hold that if the seller was notified thereof by the buyer it is a case of abandonment. But if the seller learns of it in some other way, the seller must make a tender.[48]

[46] Cort v. The Ambergate Railway Co., 17 Q. B. 127 (Eng.).

[47] See Homer v. Shaw, 98 N. E. 697 (Mass.), LEADING ILLUSTRATIVE CASES.

[48] Benjamin, Sales (Am. ed.), §§ 759, 764.

CHAPTER XV.

IMPOSSIBILITY OF PERFORMANCE.

180. **Kinds of impossibility.**—Impossibility of performance may (1) appear on the face of the contract; or (2) it may exist unknown to both or only to one of the parties at the time of the making of the contract; or (3) it may arise after the contract is made.

(1) Where the thing undertaken is obviously impossible, there is no contract. Thus, to give a promise to discover treasure by magic or to go around the world in a day, would on the face of the contract be physically impossible of performance, and no contract is created.[49]

(2) Impossibility which arises from the non-existence of the subject matter avoids the contract as indicated in the discussion on mistake,[50] for there is nothing about which the parties can agree.

(3) The rules as to subsequent impossibility form the basis of this chapter's discussion.

181. **Where impossibility is known.**—As suggested, there are two cases where the impossibility is known: (1) where it is known to both parties; and (2) where it is known to one party only.

In the first situation, since there can be neither intention nor expectation of performance, one of the

[49] Anson, Contracts (Huffcut's 2d ed.), §§ 129, 410.
[50] See § 38.

essentials of a valid contract is lacking, namely, a legal consideration. Therefore, there is no enforcible contract where the impossibility is known to both parties.

On the other hand, where the act to be performed is physically possible, but for some other reason is impossible, and this fact is within the knowledge of the promisor only, nevertheless he will be bound by the contract. In Bullock v. Pottinger's Adm'r,[51] A agreed to pay to B a certain sum of money "when I collect the money on the bond on which suit is pending." As a matter of fact, there was no such bond, and A was aware of that situation. The contract was held to be broken and B was permitted to recover.

Thus there is an action on the contract for the party who has acted in good faith and in ignorance of the impossibility. Where A, who is a married man, promises to marry B, who is ignorant of that status, B may recover damages for breach of A's promise, although A could never have performed.[52]

If the impossibility of performance is known to the promisee, instead of to the promisor, necessarily he could not expect the promise to be carried out. Therefore, it would not be binding.

182. **Subsequent impossibility.**—The mere fact that a contract turns out to be difficult to perform or burdensome does not discharge the agreement. Where A gives a promise to do an act in the future, he takes the risk incident to its performance. In general,

[51] 3 J. J. Marsh, 94 (Ky.).

[52] Wild v. Harris, 7 C. B. 999 (Eng.). In reality, it is an action based on fraud in the form of contract.

therefore, impossibility which arises subsequently to the formation of a contract does not excuse the promisor.[53] In Anspach v. Bast,[54] A purchased a coal mine and agreed to work it diligently and constantly. He is not excused from performance because of a general cessation of coal operations. Similarly, must a contractor assume the risk of increased prices in materials, and the demands of labor. In Brown v. Royal Insurance Society,[55] the insurance company, under the terms of the policy, elected to rebuild the premises which had been partially destroyed by fire. The building commissioners thereafter declared the standing portion unsafe and ordered that the whole building be torn down. Necessarily, this increased the expense of rebuilding. It did not, however, constitute an act of impossibility, but merely one of extra expense. The rule may be stated to be that "where *the law* creates a duty or charge, and the party is disabled to perform it without any default in him, there the law will excuse him; * * * but where *the party* by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."[56] That is to say, the promisor may make the performance of his promise conditional upon its continued possibility. Then the risk is on the promisee if the performance becomes impossible.[57]

[53] Anderson v. May, 50 Minn. 280, LEADING ILLUSTRATIVE CASES.
[54] 52 Pa. St. 356.
[55] 1 E. & E. 853 (Eng.).
[56] Paradine v. Jane, Aleyn 26 (Eng.).
[57] Whipple v. Refining Co., 64 Misc. 363 (N. Y.).

Illustrations of the general rule are to be found in many cases. A seller is not excused from performance if his machinery breaks down, although it is without his fault and he is therefore unable to manufacture the goods stipulated for in the contract.[58] Where A promised to build a school house for B, the building fell down when partially completed, owing to hidden defects in the soil. It was held in the case of School Trustees v. Bennett,[59] that this was no defense to A's action on the contract. He must take the risk of the nature of the soil as incidental to his contract.

183. **Same subject—Exceptions.**—The general doctrine that impossibility is no defense is harsh. Consequently, the courts will construe a contract so as to excuse performance under subsequent circumstances so extraordinary that the risk of them ought not to be thrown on the promisor. "Where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made," says the court in Chicago, Milwaukee and St. Paul Ry. Co. v. Hoyt,[60] "they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

Therefore, to the general rule that impossibility arising subsequently to the making of the contract

[58] Summers v. Hibbard, etc., Co., 153 Ill. 102.
[59] 27 N. J. L. 513.
[60] 149 U. S. 1, 14.

is no excuse, there are certain exceptions. Unless stipulated to the contrary, (1) the act of the promisee; (2) a change in law; (3) destruction of the subject matter; and (4) incapacity for personal service may excuse performance.

These exceptions, when recognized, are in the nature of conditions implied in law, because they are essentially equitable defenses. They arise from the extraordinary circumstances and nature of each case, and where there is a choice of persons, or of an article, or of a place or of the manner of performance. If the implied condition is broken, performance is excused. In other words, in the case of a condition implied by law, the defendant's defense is that he has not had or is not going to receive the performance which the plaintiff was to give to the defendant in exchange for the latter's performance. Hence, where impossibility is recognized as a defense, and the plaintiff's performance in exchange for the defendant's was assured, the defendant's defense is simply that because of the extraordinary circumstances, which the courts consider to constitute impossibility, it is not fair to require the defendant to perform as nearly as is possible or else to pay damages unless by his contract he assumed the risk of the happening of those extraordinary circumstances.[61]

It is frequently stated that acts of God excuse performance.[62] This rule is very indefinite and not yet

[61] Costigan, The Performance of Contracts, p. 62.

[62] Machine Co. v. Castings Co., 155 Fed. 77; Hughes v. Wamsutta Mills, 11 Allen 201 (Mass.), LEADING ILLUSTRATIVE CASES.

the law, for although some acts of God will serve to excuse performance, as for instance the death of A who promised to serve B, it is not always possible to determine what is an act of God.

184. **Impossibility of performance created by a party.**—If the performance of a promise is made impossible by the act of the promisee either before the time for performance arrives or in the course of performance, the promisor is discharged from his obligations. Moreover, he may sue at once for breach of the contract, and as if A had renounced his liability.[63] But if the performance is made impossible by the act of the promisor, the impossibility thus created is no defense.

Where A agrees to convey a piece of land to B on a certain day, but before that time arrives A conveys to C, B is discharged from the obligations of the contract and may sue A at once and regardless of whether or not the time for performance has arrived. Similarly, if X promises to marry Y in six months, but instead marries Z within three months, Y may sue X at once.[64] It is the act of the promisor which prevents performance; hence he is liable.

In Lovelock v. Franklyn,[65] A promised to assign to B all his interest in a lease within seven years. Before the end of that period, A assigned his whole interest to another person. B was permitted to sue at once. The court held that "the plaintiff has a right to say to the defendant, 'You have placed yourself

[63] Wolf v. Marsh, 54 Cal. 228; Delamater v. Miller, 1 Cowen 75 (N. Y.), LEADING ILLUSTRATIVE CASES.

[64] King v. Kersey, 2 Ind. 402.

[65] 8 Q. B. 371 (Eng.).

in a situation in which you cannot perform what you have promised; you promised to be ready during the period of seven years, and during that period I may at any time tender you the money and call for an assignment, and expect that you should keep yourself ready; but if I now were to tender you the money, you would not be ready; this is a breach of the contract.'"

Impossibility created by the promisor during the course of performance excuses the promisee from performing. In the case of Planche v. Colburn,[66] a publisher engaged an author to write a treatise. Before it was completed, the publisher abandoned the publication. The author was excused from further performance, and was entitled to remuneration. The abandonment of the publication discharged the contract. But where an Englishman, who was engaged as fireman on a Japanese warship, was informed when war was declared between China and Japan that a performance of his contract would bring him under certain penalties as to foreign enlistments, it was held that he was entitled to leave the ship and sue for his wages, since the act of the Japanese government had made his contract legally impossible.[67]

Distinctions. Prevention of the happening of conditions is to be distinguished from prevention of the performance of a promise. The latter excuses the promisor from liability for non-performance. The former entitles the party prevented to a right of

[66] 8 Bing. 14 (Eng.).

[67] O'Neil v. Armstrong, Mitchell & Co. (1885), 2 Q. B. 418 (Eng.); Delamater v. Miller, 1 Cowen 75 (N. Y.), LEADING ILLUSTRATIVE CASES.

action, although the condition has not been performed.[68] While an act of prevention will frequently be a prevention both of performance by the other party of his promise and also of the condition qualifying the liability of the preventing party, nevertheless, the condition may be something which neither party has promised shall be performed. In such a case, it may be important to distinguish between prevention as excusing a condition and as excusing performance of an obligation.[69]

Furthermore, it is often difficult to determine whether a case involves the rule under discussion or the doctrine with reference to impossibility created by the local law. Usually, however, an analysis of the facts will indicate the true principle to be applied. Thus, where without compulsion on the part of the board of health, a school board closes the schools because of the prevalence of contagious diseases, the impossibility of performance thus created is generally held not to excuse payment of the salaries to the teachers.[70] But where the board of health closes the school, the impossibility is held to excuse such payment.[71] In the first case, it is an act of the promisor of the contract. In the second situation it is an act of law.

185. **Impossibility by acts or change of law.**— Thus, a further exception to the rule that impossibility does not discharge a contract, is the doctrine that where an agreement may not be legally per-

[68] See Chapter XIV.
[69] Williston, Sales (2d ed.), § 193.
[70] Dewey v. Union School District, 43 Mich. 480.
[71] School District v. Howard, 5 Neb. Unoff. 340, 98 N. W. 666.

formed by reason of acts of the law, as those of a legislature, or of an executive or a court, the parties are excused from carrying out their promises. Although the performance is physically possible, since it would be unlawful to carry out the agreement, the law discharges its obligations.

In the case of People v. Globe, etc., Insurance Co.,[72] the company was dissolved in an action by the attorney-general. A, who had entered into an agreement with them for five years' employment, alleged that he had a claim for breach of contract upon the fund in the receiver's hands. The court held that by the act of dissolution, whereby the company figuratively died, the contract was discharged, and that no liability arose in favor of A. But a voluntary dissolution of a corporation does not discharge its contracts for personal service,[73] because the impossibility is of its own creation. Furthermore, where the corporation is dissolved by the state because of its wrongdoing, it would seem that the dissolution likewise should not be a defense.

Similarly, dispossession by the military authorities of one's own country will relieve a lessee from the obligation to pay rent for the period of dispossession.[74] This case falls under the rule that where the law prevents performance of a contract for a limited time only, the obligation of the contract is suspended but not discharged.[75]

Change of law. A change in the law may also

[72] 91 N. Y. 174.

[73] See subject, PRIVATE CORPORATIONS.

[74] Gates v. Goodloe, 101 U. S. 612.

[75] Wald's Pollock, Contracts (3d ed.), p. 525, note.

discharge the contract. In Baily v. DeCrespigny,[76] A leased land from B for 89 years. B retained the adjoining premises and covenanted that neither he nor his assigns would during the term erect any but ornamental buildings. But the English Parliament passed an act compelling B to part with his land to a railway company, which built a station thereon. A sued B on the covenant, and it was held the impossibility created by the statute excused him from performance.

Another situation arises where the act becomes impossible in law because the law makes it impossible in fact, and not because of any prohibition. Thus B gave a bond for A's appearance in court when A was charged by the state with counterfeiting. Later A was arrested, convicted, and sent to prison by the United States authorities on a charge for the same offense. B was sued by the state on his bond for not producing A. It was held that B was not liable.[77] The law made it impossible for him to perform in fact.

The law of a foreign country[78] or sister state being a question of fact, impossibility arising because of an act thereby or a change therein does not discharge the contract. In Taylor v. Tainter,[79] A gave a bond for B's appearance in a Connecticut court. Later, B went to New York, where he was arrested and extradited to Maine. In the latter state he was sent to prison. Consequently, A could not produce B in

[76] L. R. 4 Q. B. 180 (Eng.).
[77] Commonwealth v. Overby, 80 Ky. 208.
[78] Barker v. Hodgson, 3 M. & S. 267 (Eng.).
[79] 16 Wall. 366 (U. S.).

Connecticut. The latter state sued him on the bond and he was held liable: first, because he permitted B to leave Connecticut; and secondly, because the retention of A by the state of Maine was not to be considered as an act of law in Connecticut. The minority view of the court decided, however, that since extradition was sanctioned by the laws of the United States, it might properly be assumed that it was an act of law.

There are cases where although an act of law is involved, the obligation is not discharged. An injunction which is issued on the application of a third party restraining one of the parties of the contract does not discharge him of his obligations to the other party.[80] The court takes the view that it is the act of a third party rather than a direct act of law which creates the impossibility of performance. Similarly, it is held that one who contracts to manufacture and sell a certain kind of machinery cannot refuse to perform because such a machine will infringe an existing patent.[81]

War. Acts of war may render the performance of a contract impossible. Mere insurrections, strikes and riots, however, do not constitute acts of war to excuse such performance.[82] It must be an armed conflict between organized nations. Thus, the loading of a cargo at a foreign port after a declaration of war with that country would be illegal and the performance of a charter party is thereby excused.[83]

[80] Contracting Co. v. Campbell, 2 Cal. App. 534.
[81] E. W. Bliss Co. v. Buffalo Tin Can Co., 131 Fed. 51.
[82] Summers v. Hibbard, etc., Co., 153 Ill. 102.
[83] Esposito v. Bowden, 7 E. & B. 763 (Eng.).

The doctrine that war only suspends the operation of contracts has been accepted by American courts. Thus, during the Civil War,[84] the hostilities suspended the judicial enforcement of contracts, and their obligations did not cease. The remedy thereon revived with the restoration of peace. This is an equitable doctrine, and consequently may not be invoked in order to consider as suspended a contract which it would be unjust to revive, as where time is of the essence.[85]

186. **Existence of subject matter and place.**— Where the existence of a specific thing is essential to the performance of the contract, its destruction without the default of either party, operates as a discharge.[86] If it is evident from the nature of the contract that the parties contracted on the basis of continued existence, the subsequent destruction of the subject matter will excuse performance.

In the case of Taylor v. Caldwell,[87] A agreed to rent a music hall to B for a series of concerts. Before the days set for performance arrived, through the fault of neither party, the hall was destroyed by fire. The suit was for losses arising from the non-performance of the contract. The court held that the destruction of the hall relieved the defendant from liability.

"In the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject

[84] Semmes v. City Fire Insurance Co., 13 Wall. 158 (U. S.).
[85] New York Life Insurance Co. v. Statham, 93 U. S. 24.
[86] Dexter v. Norton, 47 N. Y. 62.
[87] 3 B. & S. 826 (Eng.).

to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

Where the subject matter ceases to exist through no fault of the plaintiff and because the defendant is at fault, the latter has no defense to an action. In the case of Soley v. Jones,[88] A contracted with B to do part of the work which A had contracted to do for C, the Boston Transit Commission. In the contract between A and C, it was provided that upon the certificate of an engineer, reciting the inability of A to complete the work in the time provided, C might terminate the agreement. A did not, however, provide for such a contingency in his contract with B. The commission terminated the agreement under the provision just given, and necessarily B could not complete the performance of his contract with A. Thereupon, B sued A for the benefits lost by such termination by C and A set up the defense of impossibility. Although B knew of the terms of A's contract with the commission, the court refused to add its terms to the contract of A and B, holding that "it is only where an unanticipated event happens, which was not in the contemplation of the parties at its inception, and upon which the continued existence of the contract must depend, that upon the happening of the event the contract is dissolved, and the promisor relieved from further performance. * * * Having made themselves responsible for the existence of the subject matter of the contract until with-

[88] 95 N. E. 94 (Mass.).

out fault on the plaintiff's part it had been performed, they are not within the exception."

If the thing which is destroyed is the very thing which one party has contracted to construct and deliver, as a piece of machinery, its destruction is no excuse for non-performance.[89]

A series of three cases illustrates the principles set forth as to the rules of impossibility where the subject matter does not continue in existence.

(1) If A agreed to furnish B with the potatoes of a certain tract of land called Blackacre, there is an implied condition that there will be potatoes grown on Blackacre; otherwise, the performance is excused by impossibility.[90]

(2) If A agreed to furnish B with 200 tons of potatoes of the crop of 1914, and there were no potatoes, it would be a question of construction as to what the crop of 1914 meant. But there would be an implied condition that there was a crop of 1914.

(3) If A agreed generally to furnish 200 tons of potatoes, there would be no condition unless no potatoes were grown anywhere.[91] If any were grown, A must furnish them.

Similarly, in the case of Turner v. Goldsmith,[92] A agreed to work for the defendant, B, as a salesman for five years. In three years the factory burned, and the defendant decided not to rebuild. A sued B for breach of contract. He was allowed to recover because the contract could yet be performed by B.

[89] Logan v. Consolidated Gas Co., 107 App. Div. 384 (N. Y.).
[90] Howell v. Coupland, L. R. 1 Q. B. D. 258 (Eng.).
[91] Anderson v. May, 50 Minn. 280, LEADING ILLUSTRATIVE CASES.
[92] 1891, 1 Q. B. 544 (Eng.).

He could have rebuilt or purchased shirts to be sold by B from other firms.[93] But if the goods were to be made at a particular factory, which burned down, B would have been excused from performance.[94]

Building contracts. Generally, in building contracts, if the defendant contracts to furnish labor and materials and to build a house on the land of the plaintiff, the destruction of the house before he completes his contract will not excuse the defendant from performance. Furthermore, he may not retain the instalments which have been paid to him on account.[95] But if the defendant agrees to repair an existing house or to furnish part of the labor and materials for a house for the plaintiff towards the erection of which the plaintiff is to furnish other labor and materials, and the house is destroyed without the fault of the defendant, he is excused from further performance.[96]

Leaseholds. The common law doctrine is that if a leasehold building is accidentally destroyed, nevertheless the lessee's obligation to pay rent continues.[97] Furthermore, if the lease contains an express covenant on the part of the lessee to make repairs or to surrender the premises at the expiration of the term in as good condition as at the beginning of the tenancy, the common law doctrine requires the performance of such covenants.[98] Statutes, however, have

[93] Clarksville Land Co. v. Harriman, 68 N. H. 374.

[94] Stewart v. Stone, 127 N. Y. 500.

[95] Wald's Pollock, Contracts (3d ed.), p. 528, note; Stees v. Leonard, 20 Minn. 494.

[96] Butterfield v. Byron, 153 Mass. 517, LEADING ILLUSTRATIVE CASES.

[97] Hallett v. Wylie, 3 Johns. 44 (N. Y.); Fowler v. Bott, 6 Mass. 63.

[98] Polack v. Pioche, 35 Cal. 416; Hoy v. Holt, 91 Pa. St. 88.

been passed in a number of the states changing this doctrine.[99]

187. **Personal incapacity.**—If A contracts to serve B for a certain period of time, and dies, he is unable to perform his promise. Similarly if he becomes seriously ill or insane, he cannot serve B as he agreed. Such an impossibility discharges the contract, for there is an implied condition in the contract that the party shall be alive and capable of performance.[1] The same rule is applied in the case where the employer dies.[2]

The impossibility caused by illness need not be absolute, for a practical impossibility constitutes a sufficient excuse. If a singer is so sick that it is unreasonable to demand that he sing, he need not perform. Furthermore, it has been held that an employee is exonerated for non-performance if a cholera epidemic breaks out which is so dangerous that a man of ordinary prudence would be justified in leaving and actually does leave.[3]

But if the nature of the services is such that the executor of a deceased party to the contract could perform, he will be called upon to do so.[4] A surviving joint contractor may also be bound.[5]

Where the party in default knows that the impossibility will occur, he cannot set up such inability to perform as a defense. Thus, if A knows that he will

[99] Wattles v. South Omaha Ice & Coal Co., 50 Nebr. 251.

[1] Yerrington v. Greene, 7 R. I. 589; Harrington v. Fall River Iron Works Co., 119 Mass. 82. Parties may contract to assume such a risk.

[2] Lacy v. Getman, 119 N. Y. 109.

[3] Lakeman v. Pollard, 43 Me. 463.

[4] Billing's Appeal, 106 Pa. St. 558.

[5] Babcock v. Farrell, 245 Ill. 14.

be incapacitated before he can complete the contract, he will not be discharged from liability for non-performance.

In Jennings v. Lyons,[6] A agreed with B that he and his wife would work for a year for a certain gross sum. Four months later, the wife, being about to give birth to a child, left the service. The court held that A would be liable for a breach of contract "not in fact, for not doing what cannot be done, but for undertaking and promising to do it." But if the illness, for instance, was reasonably believed to be only temporary; the fact that it later became incurable, will excuse performance and discharge the contract. A promised to marry B. At the time he had a curable disease. Later, it became chronic, rendering him unfit to marry. This was a defense to an action on the contract.[7] "We hold, therefore," recites the opinion in Sanders v. Coleman,[8] "that a contract to marry is coupled with the implied condition that both parties remain in the enjoyment of life and health, and if the condition of the parties has so changed that the marriage state would endanger the life or health of either a breach of the contract is excusable." But if both parties know that one of them suffers from an incurable disease, and contract for marriage, it seems that the agreement is not discharged. The court held in Hall v. Wright[9] that if the plaintiff desired that such a contract be carried out, the defendant must perform or pay

[6] 39 Wis. 553.
[7] Sanders v. Coleman, 97 Va. 690.
[8] Same case.
[9] E. B. & E. 746, 765 (Eng.).

damages.[10] But in another case, although both parties were aware of the presence of the disease (pulmonary tuberculosis), the doctrine of public policy was permitted to enter, and the contract to marry was held void.[11]

Where after the contract to marry one of the parties acquires a loathsome disease by an immoral act, his condition is not a defense to an action for breach of contract. It is suggested that this is a case where the defendant has prevented performance.[12] But if the disease is only of a temporary character, he is entitled to postpone the marriage until he is cured.[13]

188. **Scope of impossibility.**—The tendency of the law is undoubtedly toward an enlargement of the defense of impossibility. In any case where it may fairly be said that both parties assumed that the performance of the contract would involve the continued existence of a certain state of affairs, impossibility of performance due to a change in this condition furnishes and usually will be an excuse.[14] Thus, although in general an unexpected strike is no excuse for a failure of performance within an agreed time, yet if the performance is to take place within a reasonable time, an unexpected strike which the promisor

[10] See 37 American Law Review 226. Hall v. Wright is probably not law in the United States. Damages would lie in tort rather than on an agreement which if performed would be annulled. See Shackelford v. Hamilton, 93 Ky. 80, 88.

[11] Grover v. Zook, 44 Wash. 489.

[12] Costigan, Performance of Contracts, p. 65, note 175; Smith v. Compton, 67 N. J. L. 548. See § 184.

[13] Trammell v. Vaughan, 158 Mo. 214.

[14] Williston Sales (2d ed.), § 661.

cannot stop except upon unreasonable terms will be taken into account in determining what is a reasonable time.[15]

189. **Alternative contracts.**—Where A agrees to do either one of two or more things, and it is possible to do one, the fact that the other is impossible does not excuse performance of the first. Thus A leased lands to B, who agreed at his option to pay for the ore raised, or to pay a fixed rent. It was held that the fact that no minerals were found would not excuse non-performance, because it was still possible to pay rent.[16]

If because of excusable impossibility or other legal defense a contractor cannot fulfill all of a number of similar contracts, but could perform any one if he disregarded the others, it seems that he may apportion the possible performance pro rata (proportionate share) among the several contracts, and be excused from further liability.[17]

190. **Rights of parties.**—A failure to perform because of impossibility is a defense to an action for non-performance. But whether or not A may recover for such services as he has rendered is another problem. Thus A agrees to build a house for B. After considerable work is done, the incompleted building is destroyed by fire. While A may possibly defend for breach of contract, his rights of recovery for the work completed involves the principles of quasi-con-

[15] Empire Trans. Co. v. Philadelphia & Reading Coal & Iron Co., 77 Fed. 919. See Pittsburgh, Fort Wayne & Chicago R. R. Co. v. Hazen, 84 Ill. 36.

[16] Marquis v. Thompson, M. & W. 87 (Eng.); Board of Education v. Townsend, 63 Ohio St. 514.

[17] Oakman v. Boyce, 100 Mass. 477.

tracts. As B is not to pay until the house is completed and has received no benefit, the loss is usually on A.

Generally, however, personal services rendered prior to the impossibility may be recovered in quasi-contracts, on the ground that since the property on which A is working is in the custody of B, the latter assumes the risk of its existence.[18]

[18] Butterfield v. Byron, 153 Mass. 517; Wald's Pollock, Contracts (3d ed.), p. 548, note; see subject, QUASI-CONTRACTS.

THE DISCHARGE OF CONTRACTS

CHAPTER XVI.

DISCHARGE BY AGREEMENT.

191. **Modes of discharge.**—Having considered the elements which enter into the formation of a contract, the operation of the agreement when formed, its interpretation in case of dispute, and its performance, it remains to study the modes in which the contract may be discharged.

A party who fails to perform his promises under a contract thereby commits a breach of the contract. Upon every breach of a contract the injured party acquires a right of action for compensation. But it is not every breach by one of the parties that will discharge the other party from performing his part of the contract. Thus, the contract may be broken wholly or in part, and the breach may or may not operate as a discharge. Moreover, the injured party need not insist upon its discharge, but may choose to disregard the breach, and merely reserve to himself the right to bring an action for damages.

"By discharge, we must understand, not merely the right to bring an action upon the contract because the other party has not fulfilled its terms, but the

right to consider oneself exonerated from any further performance under the contract,—the right to treat the legal relations arising from the contract as having come to an end, and given place to a new obligation, a right of action."[19]

A contract may be discharged in various ways: namely, (1) by agreement; (2) by performance; and, (3) by operation of law. The right of action arising from a breach of contract may also be discharged.

192. **Discharge by agreement.**—The parties to a contract may agree that it shall no longer bind them. Since the contract is the result of agreement, the parties may agree to put an end to its obligations.

Such an agreement may either rescind the contract altogether, or merely alter some of the terms of the old agreement. Any claim arising under the original contract may then be met by setting up the new contract, so far as the latter operates to rescind or alter the former. Thus, if A contracts to build a house for B, the contract may be terminated by mutual agreement. Thereby A and B give up their respective rights under the original contract.

In discharging a contract by a new agreement, the new agreement must have all the requisites of a valid and enforcible contract. If the contract is executory, the consideration for the promise of each party consists of the abandonment by the other party of his rights. This will be sufficient, for the promise of A to discharge B is a consideration for B's promise to discharge A.[20] An instrument under seal, as in

[19] Anson, Contracts (Huffcut's 2d ed.), § 356.
[20] Dreifus v. Salvage Co., 194 Pa. St. 475.

the case of other contracts, will dispense with the necessity for a consideration,[21] except where seals have been abolished.

Waiver and gift. But if the contract has been executed on one side, for instance in a unilateral contract, an agreement of discharge requires a new consideration. Thus if A has performed, a bare waiver of his claim would not discharge B.[22] This rule also applies to promissory notes in the United States,[23] but not in England. But a surrender or cancellation of the note, although without a consideration, is an effective discharge, because it is an executed gift.[24]

Thus the promisee may make a gift of the obligation to the promisor, provided the gift is executed. That is, there must be an act done sufficient in law to a transfer of the property given. A chose in action being the subject of a gift, if it is evidenced by a written instrument, the delivery of such instrument is necessary.[25] In the event the delivery of the proper evidence of the obligation is impossible, a receipt in full is sufficient.

193. **Discharge by substituted agreement.**—As indicated, a contract may be discharged by such an alteration in its terms that a new contract is substituted for the old one; or, the old contract may be expressly waived in the new agreement. In such cases, the new agreement takes the place of the old,

[21] Anson, Contracts (Huffcut's 2d ed.) §§ 88, 351.

[22] Davidson v. Burke, 143 Ill. 139; Collyer & Co. v. Moulton, 9 R. I. 90, LEADING ILLUSTRATIVE CASES.

[23] Seymour v. Minturn, 17 Johns. 169 (N. Y.).

[24] Slade v. Mutrie, 156 Mass. 19.

[25] Hart v. Strong, 183 Ill. 349; Stewart v. Hidden, 13 Minn. 43.

either entirely, or only as to such terms as have been changed. Thus, a new agreement, upon proper consideration, may be made to lengthen the time for payment under the original contract. No action may be maintained until the expiration of this time.[26] If A and B contract for the building of a house, and later another agreement is made whereby the plans are changed, the old contract is discharged to that extent.

When a new contract is made between the same parties concerning the same matter, and its terms are inconsistent with the original contract, the new agreement will be construed to discharge the original contract.[27] But the intention of the parties must so appear. Furthermore, a mere postponement of performance for the convenience of one of the parties does not discharge the contract. Should the original agreement never be acted upon, a rescission will be implied from lapse of time, or because a new agreement has been acted upon.[28]

194. **Release.**—A release discharges an obligation. It must be distinguished from a covenant not to sue, which is an independent contract, not affecting the right of action on the original claim. A covenant not to sue is a personal defense, available only between the parties to the covenant. As pointed out in a prior section, a covenant never to sue may be pleaded in bar of the action by the covenantee.

A release at common law being under seal required

[26] Green v. Paul, 155 Pa. St. 126.
[27] Rogers v. Rogers, 139 Mass. 440.
[28] Rushbrook v. Lawrence, L. R. 5 Ch. 3 (Eng.).

no consideration. But in those states where seals have been abolished, a release without consideration is invalid.

195. **Novation.**—A substitution may consist not only of terms but also of parties. A enters into a contract with X and Y. The latter two agree between themselves that Y shall be released from his liability. A may insist that Y continue to be bound by the contract, or he may treat the contract as broken and discharged, or he may continue to deal with X alone after he has notice of Y's act. If he accepts the latter agreement, he may enter into a new contract to accept the sole liability of X. He may not then hold Y.[29] This is called novation.[30]

Similarly, the creditor may accept a new debtor in place of the old one. Thus, if one partner goes out of a firm and another comes in, the debts of the old firm may, by the consent of all the three parties, —the creditor, the old firm, and the new firm,—be transferred to the new firm.[31] Such consent may be implied by conduct, if it is not expressed in words or writing.

In order that the novation shall be valid, it is essential that the original obligation shall be an enforcible one, otherwise the surrender of it will not constitute a sufficient consideration for the new agreement.[32] Moreover, all of the parties to the contracts must be parties to the new agreement. However, very

[29] Anson, Contracts (Huffcut's 2d ed.), § 355.

[30] See § 128.

[31] Hart v. Alexander, 2 M & W. 484 (Eng.); Collyer & Co. v. Moulton, 9 R. I. 90, LEADING ILLUSTRATIVE CASES.

[32] Scott v. Atchison, 36 Tex. 76.

little evidence is required to show the consent of the original debtor. Where A has a claim against B, two steps are necessary to turn the claim into one of C against B. Such a substitution of creditors requires an assignment of his claim by A to C, and then C must contract with B. That contract will be, in effect, an agreement by which, in consideration of A's release, B promises to pay C.

Similarly, if A owes B and B owes C, an agreement may be made whereby A pays C. That is, C makes a contract with B never to sue him, in consideration that B assigns to C his claim against A. Then C contracts with A never to enforce the assigned claim, in consideration of A's promise to C. The result is that B drops out of the transaction entirely.

196. **Form.**—The ancient rule of the common law required that a contract must be discharged in the same form, or in as high a form, as that in which it is made. Hence, an executory agreement under seal could not be discharged by a parol agreement, whether oral or in writing.[33] This rule has been qualified. The time fixed for the performance of a sealed agreement may generally be extended by parol. Similarly, may terms be waived.[34] Furthermore, the parties may fix the time of performance by parol, if the sealed contract is silent on that score. A specialty may be modified or rescinded by an executed parol contract.[35] The parties having acted upon the parol agreement and altered their situation, it would be an

[33] See cases collected, 9 Cyclopedia Law and Procedure, p. 596; McCreery v. Day, 119 N. Y. 1, LEADING ILLUSTRATIVE CASES.

[34] Moses v. Loomis, 156 Ill. 392.

[35] Cooke v. Murphy, 70 Ill. 96; Green v. Wells, 2 Cal. 584.

injustice not to give it effect.[36] So it is held that the specialty may be discharged by a parol contract after there has been a breach.[37]

A simple contract, whether oral or written, may be discharged by a subsequent oral or written contract.[38] The fact that the written contract provides that no modification shall be made except in writing, is immaterial, for that very provision may be changed by word of mouth, if both parties agree.[39]

But where by reason of the Statute of Frauds a contract must be in writing, the new contract must also be in writing. This rule applies particularly to cases where the new agreement is substituted for the old.[40]

197. **Provisions for discharge.**—The parties may have agreed by its terms that a contract may be discharged by the non-fulfillment of a certain term, or by the occurrence of some event. Thus, in a bond, A is held bound to B in a certain sum, but upon the faithful performance by A of his duties, the bond is to be void. Further illustrations are to be found in the accepted risks of a charter party, whereby the ship owner agrees with the charterer to make the voyage on the terms expressed in the contract, the act of God, fire, etc., excepted.[41] Similarly, the bills of lading of common carriers contain numerous

[36] Robinson v. Bullock, 66 Ala. 548.

[37] McCreery v. Day, 119 N. Y. 1, LEADING ILLUSTRATIVE CASES.

[38] Munroe v. Perkins, 9 Pick. 298 (Mass.).

[39] Ford v. U. S., 17 Ct. Cl. 60 (U. S.); Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.

[40] Abell v. Munson, 18 Mich. 306; Browne, Statute of Frauds (5th ed.), p. 411.

[41] Anson, Contracts (Huffcut's 2d ed.), § 343.

terms limiting their liability, and insurance companies provide that the occurrence of some event, for example, leaving the insured premises vacant, may discharge the contract.[42]

A bought a horse of B. The contract of sale provided that the horse was warranted to have been hunted with the Bicester hounds, and that if it did not answer to this description the buyer should be permitted to return the animal by the evening of a specified day. The horse had never been hunted with the Bicester hounds, and A returned it within the time specified. But in the meantime the horse had been injured, but through no fault of A. It was held that A need not keep the horse. "The effect of the contract," said Cleasby, B.,[43] "was to vest the property in the buyer, subject to a right of rescission in a particular event, when it would vest in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property revested, and he must therefore bear the loss." Under such a contract, the vendee may refuse to receive the chattel at all, if he discovers that the terms be not fulfilled. If he receives it, he may return it upon discovering the non-fulfillment of the term; but if he has by his own fault injured the chattel, he is not entitled to return it.[44]

[42] Moore v. Phoenix Ins. Co., 62 N. H. 240.

[43] Head v. Tattersall, L. R. 7 Ex, 7, 14 (Eng.).

[44] Ganson v. Madigan, 13 Wis. 67; Ray v. Thompson, 12 Cush. 281, (Mass.), LEADING ILLUSTRATIVE CASES.

A third form of contract providing for its own discharge is that wherein the agreement is determinable at the option of one of the parties upon certain terms. Such provisions are usually inserted in contracts of personal service. Thus, by the terms of the agreement the master may terminate the contract by giving a month's notice or by the payment of an extra sum, and the servant may discharge his obligations by giving a certain notice.[45]

The optional discharge of a contract by non-fulfillment of a term is akin to discharge for breach of contract. But the former is based on the agreement of the parties that such non-fulfillment shall be a discharge, whereas the latter is a discharge regardless of the contemplation of the parties.

Considerable difficulty is experienced in determining whether or not the examples given are conditions precedent or conditions subsequent. But the contract of the sale of the horse probably provided for a condition precedent, because the moment the vendor failed to sell a horse of the description prescribed, there was a non-fulfillment of a term. Whereas, in the case of the bond, it was not the non-fulfillment but the occurrence of the event that terminated the obligation. The event is clearly a condition subsequent.

[45] Nowlan v. Ablett, 2 C. M. & R. 54 (Eng.); Miller v. Goddard, 34 Me. 102.

CHAPTER XVII.

DISCHARGE BY PERFORMANCE.

198. **Performance.**—When a contract has been fully performed by both sides and according to its terms, it is thereby discharged. Similarly, where a promise is given upon an executed consideration, performance by the promisor discharges the contract, for all has been done on both sides that could be required to be done under the contract. But where the contract is executory, that is, where one promise is given in consideration of another, performance of his promise by A does not discharge the contract, although it may discharge him from further liability. The contract is still in existence.[46]

It is well to distinguish between performance and discharge, in that while performance is a mode of discharge, discharge is not performance.

Furthermore, discharge by performance is to be distinguished from discharge by breach of performance. Thus, A and B by performance discharge their contract. But if A performs and B does not, B has broken the contract by failure to perform. Although as suggested, A may be excused from further performance, the contract is not necessarily discharged. A right of action arises, which is treated in a subsequent chapter.

199. **Payment.**—Payment is a common mode of

[46] Anson, Contracts (Huffcut's 2d ed.), § 36.

discharging a contract by performance. Thus, the contract may contemplate the payment of a certain sum at a specified time. Payment of that sum at that time will discharge the obligation and will constitute a performance of the contract, whether as the performance of an original or of a substituted contract.

Substituted performance. If in an agreement between A and B, the liability of B consists in the payment of a sum of money in a certain way or at a certain time, a payment in that way and at that time discharges B.[47] Or, if B, who is liable under a contract to perform various acts, wishes to pay a sum of money, or, having to pay a sum, wishes to pay it at different times, A's agreement to B's wishes will create a new contract, which discharges the original agreement. Then, payment is a performance of B's duties under the new contract, and, for him, a consequent discharge.[48] This is substituted performance.

Conditional performance. When a negotiable instrument is given in payment of a contract claim, or in satisfaction of a breach, if the parties agree that it shall be a discharge of the existing liabilities, the note alone may be sued on. Whether or not such an instrument is always taken as absolute payment, is a question of the intent of the parties. The presumption, in absence of proof to the contrary, is that the instrument is taken as a conditional payment. Then the rules of accord and satisfaction apply; that is, a suit may be filed on the contract, unless the note is paid.[49] A distinction is made between notes given

[47] Marvin v. Vedder, 5 Cow. 671 (N. Y.).

[48] Bickle v. Beseke, 23 Ind. 18; see Brewer v. Thorp, 3 Ind. 262.

[49] Harriman, Contracts (2d ed.), § 500.

for precedent debts, and those given for contemporaneous debts. Where the note of a third person is given for a debt contracted at the time, the inference is that the note is in payment of the indebtedness. But this is not the case if the debt is a precedent one, or the note of the debtor is given for a present debt. If, however, the debtor indorses the note of the third party, it operates as a conditional payment.[50]

"Payment then consists in the performance either of an original or substituted contract by the delivery of money, or of negotiable instruments conferring the right to receive money; and in this last event the payee may have taken the instrument in discharge of his right absolutely, or subject to a condition (which will be presumed in the absence of expressions to the contrary) that, if payment be not made when the instrument falls due, the parties revert to their original rights, whether those rights are, so far as the payee is concerned, rights to the performance of a contract, or rights to satisfaction for the breach of one."[51]

200. **Tender.**—A mere tender, whether of payment or of performance of an act, may discharge the person tendering from further obligation under the contract. Tender is attempted performance, and the word is applied both (1) to the performance of a promise to do something, and (2) to the performance of a promise to pay something.[52]

[50] Ford v. Mitchell, 15 Wis. 304; Gillespie Tool Co. v. Wilson, 123 Pa. St. 19, LEADING ILLUSTRATIVE CASES.

[51] Anson, Contracts (Huffcut's 2d ed.), § 350.

[52] Cleveland & Co. v. Sterrett, 70 Pa. St. 204; Knight v. Abbott, 30 Vt. 577, LEADING ILLUSTRATIVE CASES.

Thus, where A, in a contract for the sale of goods, satisfies all of its requirements, and B, the purchaser, nevertheless refuses to accept the goods, A is discharged from the obligations of the contract when he tenders the goods to B. Should B sue him, A may set up the tender as a defense.[53]

But if the performance consists of the payment of money, a tender by the debtor will not discharge the contract. Thus, if A by the terms of a contract must pay B a sum of money, A must find the creditor (B) and pay him the debt when due. If B refuses to accept the tendered payment, A must nevertheless continue always ready and willing to make payment. Then should B sue him, he may plead that he tendered the debt, but he must also plead his readiness to pay.[54] In case of suit, the plaintiff recovers the sum, but must pay the costs.

To constitute a valid performance, tender must comply strictly with the terms of the contract. Ordinarily, the exact sum should be offered. The requisites of the legal tender of money are regulated by statutes.[55] In the absence of provisions by the parties, the debtor may offer such legal tender in payment.

201. **Strict and substantial performance.**—At common law, in order to discharge the contract, the performance must be in strict accordance with its terms. This rule was enforced, even if the performance which took place was more advantageous to the promisee.[56] Where A agreed to sell 200 acres of

[53] See Hambel v. Tower, 14 Iowa 530.
[54] Werner v. Tuch, 127 N. Y. 217.
[55] U. S. Rev. Stats., title 39; 4 Fed. Stats. Ann., §§ 3584-3590.
[56] Dauchy v. Drake, 85 N. Y. 407.

land, and it turned out that the tract contained but 199 acres, there was no strict performance, and no recovery was allowed on the contract.

Through the influence of the principles of equity, the doctrine of substantial performance has been generally adopted by the courts of common law. Thus, in the illustration just given, a court of equity within its discretion could order either party specifically to perform the contract, and deduct the value of the one acre. The theory is that if the purchaser gets substantially what he contracts for, he must take it and accept compensation for the deficiency.[57]

This equitable doctrine of substantial performance is most often applied to suits of law on building contracts. Where the builder has in good faith substantially complied with the terms of the agreement, he may recover the contract price, less such an amount as will cover the omission and defects.[58] If A agrees to make a carriage just like a certain model, he is held to have performed when he makes a carriage substantially like the model.[59] Sometimes substantial performance permits a large sum to constitute the deficiency. In Philip Hiss Co. v. Pitcairn,[60] a contractor agreed to decorate the walls, ceiling and woodwork of a room, and equip it with furniture. The price agreed upon was $5,200. Later, defects in the quality of the woodwork appeared. These reduced

[57] Anson, Contracts (Huffcut's 2d ed.), § 352; see cases collected in 9 Cyclopedia Law & Procedure, p. 602; see subject, EQUITY.

[58] Palmer v. Meriden Britannia Co., 188 Ill. 508; see Crouch v. Gutmann, 134 N. Y. 45, where the dissenting opinion considers that courts are making new contracts for the parties by means of the doctrine.

[59] Meincke v. Falk, 61 Wis. 623.

[60] 107 Fed. 425.

the value about $500. The court held that notwithstanding, there was a substantial performance. In short, the deficiency consisted of one-tenth of the total amount.

Deviations from the line of strict performance, which are more than slight or trivial, will defeat a recovery on the contract by the plaintiff. Furthermore, there must be no willful or intentional departure.[61] Similarly will the non-performance of a material part of the contract defeat the operation of the doctrine of substantial performance.[62] Thus, in the case of Harris v. Sharples,[63] the court found that the contract between the parties was to furnish certain catalogue covers in accordance with the proofs which had been submitted. The plaintiffs printed their name on the last page without the defendant's permission, and were not allowed to recover on the contract.

Where recovery may not be had under the contract, certain rights arise under the principles of quasi-contracts, to be treated in a subsequent volume.[64]

[61] Gillespie Tool Co. v. Wilson, 123 Pa. St. 19, LEADING ILLUSTRATIVE CASES; Van Clief v. Van Vechten, 130 N. Y. 571.

[62] Jeffries v. Jeffries, 117 Mass. 184.

[63] 202 Pa. St. 243.

[64] See subject, QUASI-CONTRACTS.

CHAPTER XVIII.

DISCHARGE BY OPERATION OF LAW.

202. **Modes of discharge by operation of law.**—Contracts may be discharged by operation of law. Such cases arise where (1) the contract is merged, (2) a written contract is altered or lost, (3) there is a failure of consideration, (4) the breach goes to the essence, (5) the party repudiates, and (6) marriage takes place.

203. **Merger.**—The acceptance of a higher security in place of one of lower degree discharges the lower. Thus, where A sues B for a breach of contract, and a judgment is entered, this judgment absorbs the contract. The contract is said to be merged in the judgment.[65] Similarly, where A and B make a simple contract, and then embody its terms in a sealed instrument which both execute, the simple contract is merged in the specialty and is discharged.[66]

A second security taken in addition to one similar in character will not affect the validity of the first, unless there be a discharge because the second is a substituted agreement. Thus, one simple contract does not merge or extinguish another.[67] Although the term merger is sometimes applied to the substitution of one simple contract for another, there is, however, no discharge by merger, but only a substi-

[65] Miller v. Covert, 1 Wend. (N. Y.) 487.

[66] Clifton v. Jackson Iron Co., 74 Mich. 183, LEADING ILLUSTRATIVE CASES.

[67] Wylly v. Collins & Co., 9 Ga. 223.

tution depending on the intention of the parties. To constitute a merger it is necessary that the subject matter of the two securities be identical and the parties the same.[68]

Strictly, there is no merger where an oral simple contract is reduced to writing. When it is said that such a set of facts constitutes a merger, it means that the writing cannot be contradicted by evidence of a prior or contemporaneous oral agreement. In reality, this is a rule of evidence.

204. **Alteration of written instrument.**—A material alteration of a written instrument by a party thereto constitutes a discharge.[69] Thus, if A changes the amount B owes him from $50 to $100, this is a material alteration which discharges the contract.

An alteration is an act done upon an instrument by which its legal meaning or language is changed. If what is written upon or erased from an instrument has no tendency to produce this result or to mislead any person, it is not a material alteration.

What constitutes a material alteration is for the court to determine, and depends upon the character of the instrument. Any change in words or form merely, even if made by an interested party, which leaves the legal effect and identity of the instrument unimpaired and unaltered, is not material. In some manner the rights and duties of the parties must be affected. Thus, a change which makes a new stipulation or condition in the contract of the parties is material. Consequently, if A makes a contract of sale

[68] Shelby v. Chicago R. Co., 143 Ill. 385.

[69] Clough v. Seay, 49 Ia. 111, LEADING ILLUSTRATIVE CASES.

and B inserts a phrase by which A is made to say that he waives any legal defense thereto, such a change is a material alteration.[70]

Moreover, to discharge the contract the alteration must be made by a party to the contract, or by a stranger with his consent. Changes, however material, which are made by a stranger without the consent of either party, are in legal contemplation not an alteration, but a spoliation.[71] The instrument will be enforced as it was originally written if its original terms may be ascertained therefrom.[72] If, however, the change by one of the parties is made with the consent of the other, there is no alteration. Instead, a new agreement is created. Whenever it is clear from the evidence that an instrument was changed or mutilated by accident or mistake, it is not discharged. This is true even if the act was that of a party.

Loss. The loss of a written instrument only affects the rights of the parties in so far as it may cause difficulty in offering proof of the instrument. Generally, the contract is not discharged except in the case of bills of exchange and promissory notes, where upon loss the holder loses his rights unless he offers the party primarily liable an indemnity against possible claims.[73] The courts generally give relief by allowing a party to give secondary evidence of the contents of the instrument.

205. **Discharge by failure of consideration.**—An

[70] Jordan v. Long, 109 Ala. 414.

[71] 2 Cyclopedia Law & Procedure, p. 151.

[72] Camp v. Shaw, 52 Ill. App. 241.

[73] McGregory v. McGregory, 107 Mass. 543; Blade v. Noland, 12 Wendell 173 (N. Y.), Leading Illustrative Cases.

equitable doctrine has sprung up in the United States to the effect that failure of consideration will discharge a contract. Its recognition by the common-law courts illustrates the tendency toward the merging of legal into equitable rules.[74] If, for example, in a contract of sale, the article sold fails to correspond with the contracted description so as to give the vendee the right to return the article, there is said to be a consideration subsequent whereby the vendee may return the property and be discharged from his obligation. This right of rescission rests on failure of consideration.[75] Similarly, a breach of one unilateral contract may operate to discharge the obligation of a second contract for which the first is the consideration. The same is true of negotiable instruments.[76]

206. **Discharge by breach going to the essence and by repudiation.**—In a bilateral contract the obligation of one party may be discharged by a breach of contract by the other party. In order that the mere breach should operate as a discharge, the breach must go to the essence of the contract. What is or is not of the essence of the contract has been discussed. The breach does not operate as a discharge, however, unless the injured party treats it as such.

Similarly, the absolute and unqualified refusal to perform entitles the other party to treat such refusal as a discharge. In the case of repudiation, there is a discharge, although it does not go to the essence of the contract.[77]

[74] California Civil Code, § 1689, subd. 4.
[75] Harriman, Contracts (2d ed.), § 525.
[76] Withers v. Greene, 9 How. 213 (U. S.).
[77] Harriman, Contracts (2d ed.), §§ 516-520.

207. **Marriage.**—At common law the marriage of two people discharges any obligation of either to the other, unless the performance of the contract is to take place after coverture.[78] This rule is generally altered by statute.

[78] Cage v. Acton, 1 Ld. Raym. 515 (Eng.).

CHAPTER XIX.

DISCHARGE OF RIGHT OF ACTION.

208. **Modes of discharge of right of action.**—Where A breaks his contract with B, a right of action arises in favor of B. This right of action may in turn be discharged either by the terms of the contract, or by the acts of the parties, or by operation of law.

209. **Discharge by terms of contract.**—If the parties agree that in the event a right of action arises in favor of one party, he must do something, the right of action is discharged if the latter fails to fulfill such terms. Thus, in insurance policies there is often a provision that the right of action shall be barred if a claim is not filed within a certain time after a loss occurs.

210. **Discharge by acts.**—The voluntary acts which may discharge the right of action are waiver, gift, release, accord and satisfaction, and award and arbitration. The subjects of waiver, gift and release have been discussed.

211. **Accord and satisfaction.**—By accord and satisfaction is meant an agreement, not necessarily under seal, the effect of which is to discharge the right of action possessed by one of the parties to a contract.[79] Accord without satisfaction does not operate as a discharge. It is an agreement whereby

[79] Anson, Contracts (Huffcut's 2d ed.), § 405; Harriman, Contracts (2d ed.), § 39.

one of the parties undertakes to give or to perform, and the other agrees to accept in satisfaction of a claim, something other than or different from what he is or considers himself entitled to. This claim may be liquidated or in dispute, and may be based on an alleged claim arising either from a contract or a tort. Satisfaction is the execution of such agreement; that is, it is an executed accord. Accord and satisfaction, but never an accord alone, may be pleaded as a bar to an action on the original contract.[80]

Where A owes B $100, and B promises to release A upon the delivery of a horse, B may nevertheless sue A for that sum up to the time he has actually accepted the horse. Even if A promises to deliver a horse and B to give a release, the new contract is no defense to the original cause of action until it is performed and executed. In order that an accord without satisfaction may constitute a defense, the parties must have further agreed that it shall take the place of the old obligation.[81]

An accord is to be distinguished from a compromise. In Flegal v. Hoover,[82] the defendants contracted with C for the cutting of timber. C assigned the contract to the plaintiff, who performed for some time, when the defendants ousted him, claiming he was not fulfilling the terms of the contract. The plaintiff then ousted the defendants. In order to effect a settlement, the plaintiff and defendants entered into a new written agreement. This was held to be a compromise and not an accord.

[80] Alden v. Thurber, 149 Mass. 271; Kromer v. Heim, 75 N. Y. 574.
[81] Morehouse v. Second National Bank, 98 N. Y. 503.
[82] 156 Pa. St. 276.

Where A has an unliquidated claim against B, and demands $50, it is held that A's retention of a check from B in the sum of $25 is an accord and satisfaction. The claim is thereby discharged.[83] This is true even if the claimant states that he is accepting it in part payment. But if the claim is liquidated, acceptance of a check of a smaller amount is not satisfaction.

Similarly, in the case of a composition with creditors, they may agree to accept the composition agreement itself as satisfaction,[84] or they may agree to accept only the actual payment of the composition.[85] The satisfaction, it seems, must be furnished by the party liable, or by some one in his behalf.[86]

212. **Arbitration and award.**—Where a cause of action has arisen in favor of B under a contract, and A and B agree to submit the matter to arbitrators who make a valid award, the contract is thereby discharged.[87] Generally there are two possible situations: either the award determines what is due on a preëxisting cause of action, or it substitutes a new duty or debt on such an action. In the first situation, either the plaintiff may sue on the original cause of action, but the defendant may set up the award as a bar to any amount in excess of the awarded amount, or the plaintiff may sue on the award itself. In the second case, the plaintiff's remedy is exclusively on the award.

At common law, submissions of controversies to

[83] Nassoiy v. Tomlinson, 148 N. Y. 326; Flynn v. Hurlock, 194 Pa. St. 462; contra, English rule in Day v. McLea, L. R. 22, Q. B. D. 610 (Eng.).

[84] Good v. Cheeseman, 2 B. & A. 328 (Eng.).

[85] Re Halton, L. R. 7 C. A. 723 (Eng.).

[86] James v. Isaacs, 12 C. B. 791 (Eng.).

[87] Wiberly v. Matthews, 91 N. Y. 648.

arbitration and award were not favored. Courts regarded arbitrators as bodies who attempted to "oust the jurisdiction of the courts," and consequently they were limited in their operation by judicial decisions.[88] Statutes, however, have been passed in most states providing for the settlement of differences by arbitration agreements. The requirements of such acts must be strictly followed in order to obtain a valid award. Generally, it must completely dispose of the matter submitted to the arbitrator. Furthermore, it must be certain, and the arbitrators may not go beyond the powers conferred by the agreement to submit.

The agreement to submit to arbitration is no defense to a suit on the original cause of action, unless there is an award by the arbitrators. Until the award is actually made, the original contract continues to exist, and courts treat the situation as an analogy to an unexecuted accord. Moreover, such a submission is revocable at any time before an award is made.[89]

213. **Discharge by operation of law.**—The right of action for breach of contract may be discharged not only by the alteration or loss of a written instrument, by merger, and by marriage, as in the case of discharge of the contract, but also by Statutes of Limitations and by Bankruptcy Acts.

214. **Statutes of Limitations.**—At common law lapse of time did not affect contractual rights. Statutes have been passed which, although they do not

[88] Scott v. Avery, 5 H. L. C. 811 (Eng.).
[89] People v. Nash, 111 N. Y. 310.

affect the inherent character of the contract, yet do bar remedies on the contract after a certain period of time. Such statutes are called "Statutes of Limitations." Strictly speaking, they discharge the right of action, but not the contract.

Such statutes begin to take effect so soon as the cause of action arises, but usually there are certain circumstances, such as infancy, imprisonment, or absence outside of the jurisdiction, which are not included in the time of the statute. If A owes B $500 on a note, and does not pay him within a year as provided by the note, B must sue within ten years after the maturity of the note, in order to obtain a judgment against A, if the Statute of Limitation is for ten years. Such statutes further provide that if A by a written acknowledgment admits the debt, then the period is to be counted only from the time of such acknowledgment. Other statutes also provide that the payment of interest is a sufficient acknowledgment to take the debt out of the statute, so as to begin a recounting of years.[90]

215. **Bankruptcy.**—The bankruptcy of a party when determined by a competent court discharges previous debts. Where A obtains an order of discharge he is relieved from all debts provable under the bankruptcy act in question. This is true whether B's claim against A was proved or not, and even if the creditor was in ignorance of the proceedings.[91]

[90] See Stimson, American Statute Law, § 4147; Wood, Limitation of Action, pp. 82, 96; Allen v. Collier, 70 Mo. 138, and Schmidt v. Pfau, 114 Ill. 494.

[91] As to state acts, see Sturges v. Crowninshield, 4 Wheat. 122 (U. S.); see subject, BANKRUPTCY.

CHAPTER XX.

REMEDIES AND AUTHORITIES.

216. **Remedies for breach of contract.**—There are two kinds of remedies which arise where a breach of obligation is involved: first, those which are preventive; second, those which are for redress. Thus, a threatened breach of contract may be prevented by the issuance of a writ of injunction. This is an order entered by a court of equity or a court possessing chancery jurisdiction, restraining the defendant from breaking a contract.[92] An injunction is only granted when adequate redress cannot be obtained by the remedies offered at law. Thus, a singer of peculiar merits who contracts to sing at a particular theatre exclusively may be prevented by injunction from singing elsewhere during the term of her engagement.[93]

The remedies for redress for a breach of contract are of two kinds: An action for damages and an action for specific performance. The former is a remedy at law; the latter is an equitable remedy.

217. **Damages.**—The object of damages for breach of contract is to compensate the injured party for the loss actually sustained.[94] Only such damages will be allowed as a reasonable man would suppose the contract was intended to provide for.[95]

[92] See subject, EQUITY.
[93] Lumley v. Wagner, 1 De G. M. & G. 604 (Eng.).
[94] See subject, DAMAGES.
[95] Hadley v. Baxendale, 9 Ex. 341 (Eng.).

Generally, interest is not recoverable at common law as damages for the retention of money due unless the contract so provides, or usage of trade so dictates. In this country, however, interest is generally recoverable on liquidated claims; that is, where the amount of the claim is fixed. The several states have passed statutes regulating the question of interest.

The parties to a contract may agree upon the damages to be paid in case of a breach. But the courts usually relieve against penalties. Where no sum has been fixed, the actual expenses incurred by the injured party, the actual value of his services and the loss of anticipated profits are elements of damages.[96]

218. **Specific performance.**—If the remedy entitling the injured party to damages is inadequate, a court of equity may grant the complaining party an order requiring the specific performance of the contract. Where A agrees to sell B his land, and then A refuses to convey, inasmuch as B cannot purchase the same land with any damages he might recover from A, the court will order A to convey to B. If A refuses to obey, the chancellor may commit him to jail until he does obey.[97]

219. **Cancellation and rectification.**—Courts exercising chancery jurisdiction possess the peculiar power of ordering the cancellation of instruments upon a proper showing. Similarly, if a contract fails to include all of the terms which the parties intended, chancellors may rectify the mistake by inserting the

[96] United States v. Behan, 110 U. S. 338.

[97] See subject, EQUITY.

omissions, or in the case of accidental insertion, by striking out the portions not intended by the parties.

BIBLIOGRAPHY.

Many treatises have been prepared on the law of contracts. The best known English author is *Sir William Anson,* and his work has passed through many editions, of which *Huffcut's* second American edition is the most valuable to the American student of law. Other English writers on this subject are *Chitty, Addison, Pollock,* and *Leake.* The latter has recently given to the profession an exhaustive and voluminous volume.

The American writers on the law of contracts include *Story, Parsons, Benjamin,* and *Bishop. Page* offers a three-volume work which is exhaustive. *Harriman* on Contracts is recommended, with the suggestion that care must be taken in not confusing the author's personal terminology.

Particular phases of this subject have been treated by *Fry* on Specific Performance, *Browne* on Statute of Frauds, and *Bloom* on Building Contracts. *Costigan's* Performance of Contracts furnishes an excellent summary of the rules of conditions.

Legal periodicals, especially the law reviews of the various schools, furnish excellent discussions of all the phases of the law of contracts. By referring to a legal periodical index, these numerous articles may be readily located.

QUIZ QUESTIONS
CONTRACTS

(The numbers refer to the numbered sections in the text.)

1. If A agrees to pay B $25 per week and B agrees to act as his private secretary for a year, state the kind of obligation which has been created.
2. Give three definitions of a contract.
3. A agrees to sell B his house for $1,000. B agrees to buy the house for that sum. Pick out the essential things that make this a contract.
4. What other terms are used to indicate a contract?
5. Give the general classification of contracts. Explain what is meant by a specialty; by a simple contract.
6. (a) What kind of contract is that in question 3: Express, implied in fact, or a quasi-contract?
   (b) Give an example of an implied in fact contract.
   (c) If by reason of a mistake in adding a bill for groceries you pay A two dollars too much, would your right to recover for those two dollars be based on an express, implied in fact, or quasi-contract?
7. When is a contract executed; when executory?
8. A offers a reward of ten dollars for the return of his dog. B finds the dog and returns it to A. Is this a bilateral or a unilateral contract?
9. Define commutative contract.
10. Explain the difference between the terms void, voidable, and unenforcible.
11. Trace the history of contract.
12. What are the names of the forms of action brought in the enforcement of contract rights?
13. (a) A invites B to take dinner with him and B accepts. Is this an agreement which may become a contract?

(b) Explain the term agreement used in reference to the formation of a contract.

14. What may be said of the nature of agreement? What is necessary to constitute an agreement?

15. (a) Name the characteristics of an offer.
(b) Is this a good offer, "My kingdom for a horse!"?
(c) Is this an offer capable of acceptance, "I offer you my watch for purchase"?

16. (a) On Wednesday, A offered to sell B his book of Anson on Contracts for one dollar. B told A, "I shall tell you later if I will accept." After three weeks, B met A and said that he accepted his offer. Was a contract created?
(b) On Wednesday, B offered to sell A his book of Cooley on Torts for two dollars. A told B to give him until Thursday to decide. B said, "All right." That same night, without A's knowledge, B sold the book to C. The next morning B telephoned to A and informed him that he had withdrawn his offer. But A, who had decided to take the book, told B so as soon as B finished speaking to A on the telephone. Did B have the right to withdraw the offer? Give reasons for your answer.

17. What is an option?
18. In what ways do offers terminate?
19. What effect has death of the offerer on his offer?
20. Give a case where acceptance is not in the terms of the offer.

21. (a) A offered B a watch for ten dollars. After a year B accepted the offer, but A had meanwhile sold it to C. Is this a termination or a revocation of an offer?
(b) B offered to sell A a suit case for a dollar. Before A accepted, B sold it to D and then told A he withdrew the offer. Is this a termination or a revocation of an offer?

22. Give an example of a continuing offer.
23. What are the differences between a counter offer, an inquiry, and a quotation?
24. B bid for a clock which the auctioneer was holding up for sale. The auctioneer said, "The clock is yours," but

he did not let the hammer fall. Is B liable when he refuses to take the clock?

25. A orders a book by mail. Must B, the book-seller, accept in order to constitute a contract?
26. In general, what is the effect if all the terms of an offer are not communicated to the person accepting?
27. What effect have postal regulations upon agreements made by post?
28. (a) When may one accept an offer by mail?
(b) What rules regulate offers and acceptances by telegraph?
29. What is meant by a "meeting of minds"?
30. Can A accept B's offer for a reward, when he does not know of the offer, although he acts as the reward requires?
31. How may acceptance be made?
32. Does silence give consent?
33. Who may accept an offer?
34. Is an advertisement in a daily paper an offer?
35. When do offers cross?
36. A orally offers to sell B his horse and B accepts. The parties plan to prepare a written contract. May A revoke his offer before the instrument is signed?
37. What is meant by "reality of consent"? How are cases of unreality of consent classified?
38. What is meant by "mistake"? Explain fully. Explain and illustrate: (a) mistake as to the nature of the transaction; (b) mistake as to the person contracted with; (c) mistake as to the subject matter. In what cases does mistake as to the subject-matter of the contract avoid the contract? Illustrate each case by giving an example.
39. What is the test of a mistake in order to avoid a contract?
40. Give an example of a mistake in motive. What is its legal effect?
41. When does a mistake of law not affect a contract?
42. Name the effects of a mistake.
43. Explain fully what is meant by "misrepresentation," and distinguish it from "fraud." What contracts are affected by misrepresentation? Why? Explain the

effect of misrepresentation upon contracts of fire insurance, marine insurance, life insurance, sale of land, and purchase of shares in companies.

44. A tells B A's horse is the finest in the world. B agrees to buy the horse and finds the fact to be otherwise. Is A's statement sufficient to avoid the contract?
45. Does a misrepresentation of law avoid a contract?
46. Distinguish misrepresentation, conditions, and warranties.
47. Why must a representation be acted upon?
48. Is any degree of care required of the party who seeks to avoid a contract because of misrepresentation?
49. Of what legal effect is misrepresentation?
50. Define "fraud," and give the elements necessary to constitute fraud. Explain fully each of the elements of fraud
51. What is the effect of fraud as to the remedies given an injured party? Is the contract rendered void or voidable?
52. Define and explain what is meant by "duress."
53. What is meant by "undue influence"? How may the presumptions of the presence of undue influence arise?
54. What is said of the right to rescind a contract for undue influence?
55. Explain fully when rescission of a contract may take place.
56. Trace the history of specialties.
57. What is a seal? Of what may a seal consist?
58. (a) Which is regarded of greater solemnity, a simple contract or a specialty?
    (b) Which would absorb the other?
59. Define deeds, bonds, records.
60. Must a specialty be delivered; if so, in what form?
61. What statutory changes have been made with regard to specialties?
62. Define consideration. Trace its historical growth.
63. Distinguish motive and consideration.
64. What is a valuable consideration? Is there any difference between a "valuable consideration" and a "full and valuable consideration"?

65. If A agrees to give B a horse in consideration of B's giving him a kernel of corn, is the consideration sufficient to support a contract?
66. What kind of contract possesses an executed consideration?
67. What is meant by a good obligation?
68. Will a moral consideration support a contract?
69. Define unreal consideration.
70. A agrees to buy all the nails he will notify B to deliver. Is the obligation of A and B mutual?
71. When is forbearance to sue a consideration? Is part payment of a sum certain consideration for a release?
72. What is a compromise?
73. What is an accord? When is it satisfied?
74. If one agrees to do what he is already legally bound to do, may he thereby accept an offer and make a contract?
75. A abandons his contract with B, who agrees to pay him $50, if he will abide by its provisions. May A recover the $50?
76. Of what effect is a promise to perform when it is made to a third person?
77. Do mutual promises constitute a consideration?
78. What is the rule as to consideration in compositions with creditors?
79. What is meant by a past consideration?
80. Discuss the rules of consideration for subscription agreements.
81. What is the effect upon the contract of a consideration void in part and entire in nature? If the consideration is separable and fails in part, what is the effect on the contract? If illegal in part, what is the effect?
82. When is a consideration presumed?
83. (a) Explain what is meant by the Statute of Frauds.
(b) Give the provisions (from memory) of the fourth section.
84. (a) Discuss the construction of the fourth section.
(b) Are contracts falling within the fourth section void, voidable, or unenforcible?
85. What promise of an executor must be in writing?

86. What is meant by "any special promise to answer for the debt, default, or miscarriage of another person"?
87. A promises to marry B next week. Must this promise be in writing?
88. What interests in land fall within the Statute of Frauds? Describe the distinction between *fructus industriales* and *fructus naturales*. What are the four general kinds of contracts regarding land?
89. On October 1, A contracts orally with B to work for him for a year, beginning December 1. Is this contract within the Statute of Frauds?
90. What effect does the Statute of Frauds have on an executed oral contract? Does part performance take an oral contract out of the statute in a law or an equity court, or both?
91. Give the provisions of the seventeenth section of the Statute of Frauds. To what class of contracts does it apply?
92. What methods may one adopt to avoid the application of this section? What are the three doctrines relating to executory contracts for the sale of goods.
93. (a) What must a memorandum contain to satisfy the Statute of Frauds?
    (b) Is this a sufficient memorandum?—
    "You buy of me h....for cd." "Cd" is a private price mark known to both of us. "h....," the subject-matter, is a horse. No proper names appear.
    (c) Must the consideration appear in the memorandum?
    (d) Who may sign the memorandum?
94. What, in general, may be said of parties to a valid contract? From what causes does incapacity to contract arise?
95. Why may infants avoid contracts made during infancy?
96. What may be said as to the incapacity of married women to contract?
97. What is the test of mental deficiency which incapacitates a person to make a valid contract? Discuss contracts made by a lunatic.
98. May an alien enter into a contract?

99. Are the professions under disabilities with reference to contracts for services?
100. When may a convict make a contract?
101. Discuss the capacity of a corporation to contract.
102. Has a state the power to contract?
103. (a) What may be the subject matter of a valid contract? (b) In what ways do objects become illegal as the subject matter of a contract?
104. Discuss the effect of a contract to make doctors' bandages on Sundays.
105. What is a wager? What wagering contracts are legal, if any?
106. What is meant by usury? What is the legal rate of interest in your state?
107. (a) Name the agreements contrary to public policy. Define each. (b) What is meant by a contract *contra bonos mores?* May A, who paid B $50 to seduce A's wife, recover the $50 when the wife refuses to consent?
108. (a) Discuss what contracts in restraint of trade are legal. (b) Is A, who sells B his business and agrees not to enter into the same business for five years anywhere on earth, bound by that agreement?
109. Discuss marriage separation agreements.
110. Of what effect is a contract to corrupt one who holds a position of trust?
111. (a) What is the difference between an act *malum in se* and one *malum prohibitum?* (b) Why is this distinction important in the law of contracts?
112. Of what effect are promises made concerning past illegal transactions?
113. Does intention affect the effect of an illegal contract?
114. What is partial illegality?
115. Is the illegality of a contract affected by change of time or place?
116. A and B make a contract to give C a job. Is C bound by that contract?
117. What is meant by the statement that a contract cannot impose liability upon a third party?
118. Give an exception to the rule.

119. What duties does a third person owe to the parties of a contract?
120. If A, for $500, agrees with B to give X support for ten years, may X sue on their agreement?
121. What is the New York rule with reference to the last question?
122. What limitations have been made to the rule of Lawrence v. Fox?
123. Of what effect is A's promise to B to release C of his debt to A?
124. Does the rule of Lawrence v. Fox apply to sealed contracts?
125. May a contract be assigned? How?
126. May liabilities be assigned? When?
127. What were the limitations at common law upon the right to assign rights under a contract?
128. What is novation?
129. How were rights under a contract assignable in equity?
130. Does the assignee take subject to defences?
131. What rights may be assigned?
132. When are personal service contracts assignable?
133. Discuss the form necessary to create a valid assignment.
134. When may future earnings be assigned?
135. What claims may not be assigned?
136. Define partial assignment.
137. Discuss priority of assignments.
138. Distinguish between assignment and negotiability.
139. What effect have statutes had on the common law of assignments?
140. Discuss how rights and liabilities under a contract may be transferred by operation of law. Explain what is meant by "covenants that run with the land." What is the effect of the death or bankruptcy of a party to a contract, as regards the passing of his rights and liabilities to his representative or heir?
141. How many persons may be promisors, and how many promisees?
142. May promisees be joint and several?
143. What is a joint contract?
144. Give an example of a several contract.

145. In a joint several contract, wherein A, B, and C are the promisors, whom may the promisee sue?
146. Explain what is meant by the interpretation of a contract?
147. When is the interpretation of a contract a matter of law? What exceptions arise to the rule excluding parol evidence from varying the terms of a written contract?
148. Discuss what evidence is admissible to show the existence of a document.
149. What may be shown to invalidate a written agreement, or prove that there never was a valid agreement?
150. (a) Under what heads is evidence admissible to vary the terms of a written contract? (b) Discuss and give examples of supplemental or collateral terms that may be added to a written agreement. (c) Discuss cases requiring explanation of terms; cases introducing a custom or usage. (d) Show how to correct a mutual mistake.
151. Discuss rules of construction. How is the intention of the parties to be ascertained? How are terms to be construed? What may be said as to time being of the essence of the contract?
152. Name several subsidiary rules of construction.
153. When may a penalty be recovered?
154. What kinds of promises may a party make?
155. Give an example of an independent promise.
156. A agrees to buy B's typewriter for $50, B promises to sell it to A for $50. What kind of promises are involved?
157. Define a condition. Give an example.
158. What is an express condition?
159. Distinguish between express conditions and those implied in fact.
160. When is a condition implied in law?
161. How must the three kinds of conditions be performed?
162. Give an example of a condition precedent.
163. When are conditions concurrent?
164. Define condition subsequent.
165. How must the plaintiff plead a condition precedent; a condition concurrent?
166. Distinguish between representations and warranties.
167. Trace the history of conditions.

168. (a) In what kinds of contracts do express conditions occur? (b) May express conditions be waived?
169. A agrees to pay for the contractor's work when the architect certifies as to its completion. What rights has the contractor if the architect, colluding with the owner, refuses to certify when the work is actually completed?
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